(19,065 and 19,066.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 414.

THE CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KY., APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY.

No. 415.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, APPELLANT,

vs.

THE CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, KY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 Proceedings of the circuit court of the United States for the sixth judicial circuit and eastern district of Kentucky, at a regular term begun and held at the Federal Court hall in the city of Covington, Monday, April 6", A. D. 1903, and of our Independence the 127" year.

Court met.
Present: Honorable A. M. J. Cochran, judge.

FIRST NATIONAL BANK OF COVINGTON, KY.,
v.
THE CITY OF COVINGTON. } # 2195.

Be it remembered that heretofore, to-wit:—on July 23" A. D. 1903 bill of complaint was filed herein which was and is in words and figures following, to-wit:—

Bill of Complaint.

The Circuit Court of the United States in and for the Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, Kentucky, a Corporation, Complainant,
v.
THE CITY OF COVINGTON, a Municipal Corporation, & John N. Middendorf, the Assessor of the City of Covington, Defendants. } In Equity.

To the honorable the judge of the circuit court of the United States in and for the district of Kentucky:

2 The First National Bank of Covington, Kentucky, a corporation, organized, existing and doing business in the city of Covington, Kentucky, under and by virtue of the act of the Congress of the United States known as the national bank act, and amendments thereto, brings this, its bill, against the City of Covington, a municipal corporation organized and existing under the laws of the State of Kentucky, and John N. Middendorf, the duly elected, qualified and acting city assessor of the city of Covington, and a citizen of said State of Kentucky and an inhabitant of the district of said State of Kentucky.

And thereupon your orator complains and says that it was organized, authorized, permitted and chartered to do business as such national bank in the city of Covington, Kentucky on the 17" day of November, 1884, for a term of twenty (20) years thereafter, up to and including the 17th day of November 1904, the authority so to do

having been issued to it upon said 17th day of November 1884 by the then Comptroller of the Currency of the United States and the said city of Covington.

Covington is a city of the second class in and of the State of Kentucky and is now and was a municipal corporation in Ky. at all the times herein stated; and the said John N. Middendorf is now, and has for more than one year last past, been the city assessor of said city of Covington.

And your orator further complaining says that the Commonwealth of Kentucky by an act of its General Assembly incorporated in 1834 the Bank of Kentucky, which by this act of incorporation and amendments thereto was authorized to engage in the business of banking for a term ending in the year 1906; and by other acts of its General Assembly it incorporated the Northern Bank of
3 Kentucky, and the Farmers Bank of Kentucky, and other banking institutions, and by said acts of incorporation and amendments thereto authorized and empowered the said banks to engage in and do a general banking business in the State of Kentucky until the said year 1906; and it says that it was provided in the various acts incorporating said respective banks, that said banks should through their respective cashiers on the first day of July in each year during the continuance of their charters pay into the treasury of the State fifty cents on each share of $100.00 of stock, which should be in full of all tax or bonus. And your orator says that from the year 1835 up to and including the year 1886, in pursuance of the contracts thus made by the State of Kentucky to and with said banks, all banks doing business in the State of Kentucky paid into the treasury of the State of Kentucky in July of each and every year a tax of fifty cents on each one of its shares of one hundred dollars, although at no time during said period was so great a rate of tax paid to the said Commonwealth upon any other species or kind of property.

Complainant says that beginning with the year 1882 an effort was made to subject the property of the said Bank of Kentucky, and the Farmers bank, and other banks, to the payment of local or municipal taxes in addition to the said tax paid to the State of Kentucky, and subsequently an effort was made to subject national banks located within the said State to the payment also of local or municipal taxes in addition to the fifty cents on each share of one hundred dollars of its capital stock and that was paid to the said Commonwealth.

And complainant says that on and before the 17th day of May, 1886, suits were pending in the courts of the Commonwealth of Kentucky under the styles of The Bank of Kentucky against
4 The City of Frankfort, and The Farmers Bank of Kentucky against The City of Frankfort, and The City National Bank of Paducah, Kentucky, against The City of Paducah, etc., wherein *it* was asserted by the respective municipalities the right to subject the property of the said banks to the payment of municipal taxes, and such right being controverted by the said respective banks.

And complainant says that the said Commonwealth of Kentucky by an act of its General Assembly, approved the 17th day of May 1886, entitled: "An act to amend the revenue laws of the Common-"wealth of Kentucky," and by article second thereof under the subject of "Stocks in banks and other institutions" in view of the fact that under the contract it had entered into with said banks whereby, upon a payment by the banks in said State of Kentucky to it annually of fifty-cents on each share of one hundred dollars of their respective stock, they were exempt from the payment of any other tax or bonus during and for the period ending 1906, and in view of the said controversies then pending for judicial determination, proposed to the banks and other institutions of loan or discount within the State of Kentucky, and provided as follows, to-wit:—

SECTION ONE. "That shares of stock in State and national banks, "and other institutions of loan and discounts, and in all corpora-"tions required by law to be taxed on their capital stock, shall be "taxed seventy five cents on each share thereof equal to one hundred "dollars, or on each one hundred dollars of stock therein owned by "individuals, corporations, or societies, and said banks, institutions, "and corporations shall in addition, pay upon each one hundred "dollars of so much of their surplus, undivided surplus, undivided "profits, or undivided accumulations as exceeds an amount equal "to ten per cent. of their capital stock, the same rate of taxation — is

"assessed upon real estate, which shall be in full of all tax,

5 "State, county and municipal."

And further provided that the auditor of public accounts might, at his option, investigate the books of such banks or institutions for the purpose of ascertaining the surplus &c. and made said banks and institutions subject to indictment and fine for refusal to allow such investigation to be made.

And by section two: "The cashier of a bank and the treasurer of "any other institution or corporation whose stock is taxed, shall on "the first day of July in each year, report to the auditor of public "accounts the true amount of the capital stock, and the true amount "of surplus, undivided profits, or undivided accumulations, and "how or in what said surplus, undivided profits, or undivided accu-"mulations is invested, and pay into the treasury the amount of "tax due."

And further imposed a penalty upon the cashier for failure to pay such tax, and require an affidavit from him stating the amount of the capital stock &c. of the bank and how the surplus was invested.

SECTION FOUR. "That each of said banks, institutions and corpora-"tions, by its proper corporate authority, with the consent of a ma-"jority in interest of a quorum of its stockholders, at a regular or "called meeting thereof, may give its consent to the levying of said "tax, and agree to pay the same as herein provided, and to waive "and to release all right under the acts of Congress or under the "charters of the State banks to a different mode or smaller rate of "taxation, which consent or agreement to and with the State of "Kentucky shall be evidenced by writing under the seal of such

"bank and delivered to the governor of this Commonwealth; and "upon such agreement or consent being delivered and in considera-
"tion thereof, such bank and its shares of stock shall be ex-
6 "empt from all other taxation whatsoever so long as said tax
"shall be paid during the corporate existence of said bank."

SECTION FIVE. "That said banks may take the proceedings author-"ized by section 4 of this act at any time until the meeting of the "next General Assembly. Provided, they pay the tax provided "in Section 1 from the passage of this act."

SECTION SEVEN. "If any bank, State or national, shall refuse or "fail to pay the tax imposed by this act, or shall fail or refuse to "make the consent and agreement as prescribed in section 4, the "shares of stock of such bank, institution or corporation, and its "surplus, undivided accumulations, and undivided profits, shall be "assessed as directed by section 2 of this act, and the same taxes, "State, county and municipal, shall be imposed, levied and collected "upon the assessed shares, surplus, undivided profits, undivided "accumulations, as is imposed on the assessed taxable property in "the hands of individuals. Provided, that nothing herein con-"tained shall be construed as exempting from taxation for county "or municipal purposes any real estate or buildings owned and "used by said banks or corporations for conducting their business, "but the same may be taxed for county and municipal purposes as "other real estate is taxed."

And your orator further complaining says that the terms and conditions of said act of May 17", 1886, were accepted by, and the contract therein provided for entered into and made with the State of Kentucky by said Bank of Kentucky, Farmers bank and Northern Bank of Kentucky, and by a very large majority of all the banks, both State and national and other institutions of loan and discount in the State of Kentucky. Complainant says that within the time provided by section 5 of said act, and upon the 22" June 1887 at a called meeting of its stockholders, a majority in interest
and of a quorum of its stockholders gave their consent to the
7 levying of the tax thus provided, and agreed to pay same as
in said act provided, and to waive and release all rights of the plaintiff under the acts of Congress or under the charter of the State banks to a different mode or smaller rate of taxation, and authorized the proper officers of the complainant to so agree, consent and waive, and to make and enter into said contract upon the part of this complainant and its shareholders, to and with the State of Kentucky, and to deliver to the governor of said State a writing under seal of complainant and executed by its proper corporate authorities evidencing such agreement, consent and contract to and with the State of Kentucky.

And complainant says that upon the 22nd June 1887 it did deliver to the then governor of the Commonwealth of Kentucky such written agreement and consent, an authenticated copy of which is filed herewith as part hereof marked "Exhibit A," wherein and whereby the State of Kentucky entered into an irrevocable contract

with your complainant, which the said State cannot annul or repeal without the consent of your complainant, and is binding on said State and all its departments, including the defendant, City of Covington.

And your orator further complaining says that it, the complainant had paid said tax as provided in section one of said act, from the passage of said act of the 17th of May, 1886.

And complainant says that upon the first day of July of each and every year since the passage of said act of May 17th 1886, and the making of said contract and agreement with the State of Kentucky, it has made to the auditor of public accounts of said State the reports as — section 2, of said act required, and paid into the treasury of the State of Kentucky a tax of seventy five cents on each of its shares of stock of one hundred dollars, and on the surplus, and on the excess of surplus, and on its real estate, as by said law
8 provided and by the said contract agreed, which tax by it so paid has been accepted and received and retained by the State of Kentucky. It says that it has since regularly and each year paid to defendant City of Covington all the tax assessed or demanded by said city on its real estate and banking building, and there is now no tax claimed by said defendant to be due or owing thereon.

Your orator further complaining says that the rate of taxes assessed by the State of Kentucky upon all other real and personal estate during all of said years beginning with the year 1886, and since that time, has not exceeded in any one year fifty-two and one-half cents on each one hundred dollars of assessed valuation, and during several of said years has been much less, being as low as forty-two and one-half cents on each one hundred dollars valuation during a part of said period.

Complainant avers that the defendant, City of Covington, and all of its officers, including the defendant, John N. Middendorf, are conclusively estopped by former litigation and adjudication between your complainant and said City of Covington to contend in this suit that your complainant has not an irrevocable contract with the State of Kentucky limiting its taxes to those fixed in said act of 17th May 1886, known as the "Hewitt law," and that the said city has not right to assess for taxation for municipal purposes or collect any taxes on any of its shares of stock, or any of its property other than its banking building and the land upon which it is situated.

Complainant says that the State of Kentucky by an act of 11th November 1892 of its General Assembly, which became a law without the signature of the then governor, undertook to provide a different mode of assessing the value of the capital stock and property of complainant and other banks in the State of Kentucky, and to invalidate and repeal the contract entered into by and between it
9 and the State of Kentucky as herein before stated under the act of May 17th, 1886, commonly known as the "Hewitt law," to which invalidation and repeal this complainant never consented or agreed. Said act of 11th of November 1892 constituting the auditor, treasurer and secretary of state a board of valuation and

assessment for fixing the value of the franchise of all banks, and providing that all banks should annually pay a tax on such valuation so fixed, to the State of Kentucky and a local tax thereon to the county, incorporated city, town or taxing district where the bank was situated, and said board of valuation and assessment did fix the value of the franchise of this complainant upon which it should pay tax to the defendant, The City of Covington, for the year 1893 at $719,441.30 and certified the same to the county court clerk of Kenton county, Kentucky, in which county your complainant was and is situated, which clerk certified the same to the city treasurer of defendant, City of Covington, all of which was in accordance with said act of 11th November, 1892, and the defendant's rate of taxation for said year 1893 being two dollars and seven cents on that one hundred dollars valuation made a tax of $14,892.43, which said city claimed to be entitled to receive for city purposes from this complainant, and for which it threatened to distrain and to take other steps by said act authorized, said defendant City of Covington claiming that said contract had been invalidated and repealed; and your complainant having theretofore paid to said defendant, City of Covington, the taxes upon its real estate and banking building that were used in carrying on its business, the said $14,892.30, or any part thereof, not being claimed upon the real estate owned by complainant. Complainant insisting and relying upon its contract made and entered into with the State
10 of Kentucky, as heretofore stated, which exempted it and its shares of stock from all taxation by the City of Covington, and that the said defendant had no right to assess or exact any taxes whatsoever upon its capital stock, or the shares thereof, and that it and its shares of stock were exempted from taxation by the said defendant, and the said defendant, City of Covington, contending that said contract had been by the State of Kentucky invalidated and repealed, and that this complainant and its shares of stock were not by reason of such contract exempt from taxation by the City of Covington, it the complainant, on the 17th of November, 1893, filed its action in equity in the Kenton circuit court against the defendant herein, The City of Covington, the said Kenton circuit court being a court of full and complete jurisdiction in the premises, setting up the making and existence of its said contract with the State of Kentucky and the facts in relation thereto, and all the facts hereinbefore stated, and that the State of Kentucky had no right to announce or repeal said contract and that said act of 11th of November 1892 in so far as it attempted so to do was in violation of the Constitution, both of the United States and of the State of Kentucky, in impairing the obligation of a contract, being in violation of section 10, article 1, of the Constitution of the United States, and of section 19 of the constitution of the State of Kentucky, and relying on its contract as hereinbefore stated made and entered into, and that by reason of said contract it and its shares of stock were exempt from any taxation by the defendant, City of Covington, during the corporate existence of complainant, and by the

prayer thereof prayed that the City of Covington be enjoined and restrained from collecting or attempting to collect said alleged tax of fourteen thousand eight hundred ninety two and 43/100 ($14,892.43) dollars, or any part thereof, and that said
11 alleged claim be adjudged invalid by reason of said contract and for all proper relief, and for its costs, etc. Complainant says that summons was issued upon its said petition in equity so filed, and was executed upon the defendant, The City of Covington, on the 17th of November, 1893, and upon the 27th of November 1893, said defendant, City of Covington, appeared to said petition in said action and filed its demurrer to said petition. And it says that thereafter the judge of the Kenton circuit court, being personally interested in the result of the litigation, declined to preside in said cause of this complainant against the City of Covington, and by agreement said cause was transferred to the Campbell circuit court at Newport, Kentucky, it being a court of full and complete jurisdiction in the premises, and the said cause thereafter proceeded in the said court to a final hearing and determination. It says that said cause having been presented to the said Campbell circuit court, it having been fully advised in the premises, on the 27th of January, 1894, adjudged and decided that the said demurrer of complainant to the said petition in equity, should be overruled, and the defendant failing and refusing to answer in the case, the said Campbell circuit court adjudged and determined that the contract entered into by and between the said plaintiff, the complainant herein, and the State of Kentucky, on the 17th May, 1886, known as the "Hewitt law" was valid and binding and was irrevocable during the existence of this complainant by paying said tax to the State of Kentucky of seventy five cents on each of its shares of capital stock equal to one hundred dollars, and on the excess of its surplus, as in said "Hewitt law" provided, which should be in full of all taxes, State, county and municipal, and that
12 the City of Covington could not demand or collect any taxes whatsoever upon any of its shares of stock, or any of its property except the real estate owned and used by it for conducting its business, and perpetually enjoined the said City of Covington from attempting to collect said alleged tax for said year 1893 by said city claimed. And complainant says that the said City of Covington excepted to said judgment of the Campbell circuit court, and prayed an appeal to the court of appeals of Kentucky therefrom, which appeal was by said Campbell circuit court granted. Complainant says that the defendant, City of Covington, prosecuted said appeal from said judgment of the Campbell circuit court to the court of appeals of Kentucky, and the said matter was presented and submitted to the court of appeals of Kentucky, and the said court thereafter upon the first day of June 1895, adjudged and determined that the written acceptance by complainant of the provisions of said revenue law of 1886, known as the Hewitt law, constituted and irrevocable contract between it and the State of Kentucky during its corporate existence, and that it and its shares of stock were exempted

from any taxes by the defendant, City of Covington, during the corporate existence of complainant, and that the provisions of said act of 11th of November 1892 attempting to authorize such taxation, *was* in violation of the provisions of the Constitution of the United States that no State could pass any law impairing the obligation of a contract, and also violative of the State constitution, and affirmed the judgment of the Campbell circuit court from which the said City of Covington had appealed. The opinion and judgment of said court of appeals of Kentucky in said cause of City of Covington, appellant, against First National Bank of Covington, Ky., appellee, is reported at pages 590 to 646, both inclusive, of volume 97 of the reports of the cases decided by said court of appeals of Kentucky.

13 Complainant says that thereupon upon the 10th day of October 1895 the said court of appeals issued its mandate on said judgment, which mandate is in words as follows, to-wit:—

"THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CITY OF COVINGTON, Appellant, *v.* FIRST NATIONAL BANK OF COVINGTON, Appellee.	June 1", 1895. Appeal from a Judgment of the Campbell Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

A. A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Complainant says that said mandate was upon the 2nd day of December, 1895, filed in the said cause in the Campbell circuit court.

Complainant files herewith as part of this bill a certified copy of the entire record in said cause in the Campbell circuit court, all pleadings, orders and judgments, and marks it Exhibit "B."

Complainant further says that the said judgment of the court of appeals of Kentucky in said appeal by the said City of Covington, defendant herein, from the said judgment of the Campbell circuit court, in favor of this complainant in said cause, so adjudging that this complainant had such irrevocable contract with the State

14 of Kentucky, and that the said defendant, City of Covington, by reason of said contract had no right to assess for taxation of this complainant other than its real estate and banking building as hereinbefore stated, or to collect or to attempt to collect any taxes from it or upon its said property or capital stock, or shares of stock or any part thereof, and that its shares of stock are not assessable by the said defendant, City of Covington, for taxation during the corporate existence of complainant, has

never been reversed or modified in any respect, nor was there ever any appeal therefrom, and said judgment and holding by said Campbell circuit court and by the court of appeals of Kentucky was and is final and conclusive between this complainant and the City of Covington; and the question as to the existence of said irrevocable contract by and between it and the State of Kentucky precluding the defendant, City of Covington, from in any way asserting such claim for taxes against it, or against its shares of stock, or any of its property other than its real estate and banking building as hereinbefore stated during its said corporate existence, was and is *res judicata*, and binding and conclusive upon said defendant, City of Covington, and all of its officers and agents, and this complainant, during the term of its corporate existence as hereinbefore stated, and said City of Covington is conclusively estopped from claiming or asserting to the contrary, or assessing for or attempting to collect any tax on its shares of stock or other property or other than its real estate.

And complainant further shows unto your honor that the defendant, City of Covington, notwithstanding the premises is asserting the right and power to assess for taxation for municipal purposes all of the shares of the capital stock of this complainant for
15 the years 1893, 1894, 1895, 1896, 1897, 1898, 1899 and 1900; and said City of Covington and its city assessor, John N. Middendorf, are claiming the right and power so to do by reason of the provisions of the act of the General Assembly of the Commonwealth of Kentucky entitled, "An act relating to the taxation of "shares of stock of national banks," approved March 21", 1900, being senate bill No. 188, and chapter 23 of the Session Acts of 1900 of the General Assembly of the Commonwealth of Kentucky, and found on page 65 of the official publication of the acts of said session of said General Assembly. Said act and its preamble being as follows:—

"Whereas the Supreme Court of the United States has lately decided that article three (3) chapter one hundred and three (103) of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore,

Be it enacted by the General Assembly of the Commonwealth of Kentucky;

SEC. 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

SEC. 2. For purposes of the taxation provided for by
16 the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies *or* any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: Provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years: And provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and that same shall be certified to the proper collecting officers for collecting as assessments of real estate are certified for collection of taxes thereon.

SEC. 5. The assessments of said shares of stock and collection of taxes
thereon, as contemplated by this act may be enforced as as-
17 sessment of real estate and collection of taxes thereon may be enforced.

SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the supreme court.

SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage.

And your orator further complaining says that the said defendant, John N. Middendorf, city assessor of the city of Covington, heretofore on the — day of May, 1900, called upon this complainant and demanded of it that it report to and list with him for taxation for municipal purposes by the City of Covington, all of the shares of stock of this complainant for the years 1893 to 1900 both inclusive; and that in response to said demand its board of directors on the 6th day of June 1900 adopted a resolution directing its president and cashier for the reasons in said resolution set out, being the same as in this bill set forth, not to report to or list with the said city assessor of the city of Covington for taxation any of the shares of its stock, and it furnished a copy of said resolution to the said John N. Mid-

dendorf, city assessor of the city of Covington. A copy of said resolution so adopted by its board of directors and presented to said city assessor of the city of Covington is filed herewith as part hereof marked Exhibit "C."

Your orator further says that heretofore on the — day of June, 1900, the said John N. Middendorf, city assessor of the city of Covington, caused to be executed upon Frank P. Helm, the presi-
18 dent of complainant, a notice in writing calling upon said Frank P. Helm, as president of this complainant to, on or before the 30th day of June, 1900, report to him, said John N. Middendorf, city assessor as aforesaid, at his office and list with him for taxation for municipal purposes by the City of Covington all of the shares of stock of this complainant for the said years 1893 to 1900, both inclusive; and the said John N. Middendorf, city assessor as aforesaid, has announced to said Frank P. Helm, president, and threatened that unless the said Frank P. Helm, as president of complainant will forthwith report to and list with him as such city assessor, for taxation for municipal purposes by the defendant City of Covington, all of the shares of stock of this complainant, that he, the city assessor, as aforesaid, will state the facts to the police judge of the defendant, City of Covington, and cause said police judge to issue a warrant against said Frank P. Helm, the president of this complainant, or its cashier, and move said judge of the police court of the city of Covington, to fine said Frank P. Helm, president, as aforesaid, or said cashier, for failing to report to and list with him as city assessor as aforesaid, all of the shares of stock of this complainant, for taxation for municipal purposes by the City of Covington; and by process of contempt from said court compel said Frank P. Helm, president as aforesaid, or its cashier, to list said shares of stock for taxation for municipal purposes by the City of Covington for each of the years aforesaid, said John N. Middendorf claiming the right and power so to do under and by reason of the provisions of the general law of Kentucky governing cities of the second class in said State, of which class the defendant, City of Covington, is; and especially and particularly section 3179 of the Kentucky Statutes.

Your orator further shows unto your honor that during each of said years 1893, 1894, 1895, 1896 and up to first day of July
19 1897 the capital stock of complainant was $500,000.00 and since then and is now $300,000, divided into shares of one hundred dollars each, which shares during all of said time and now are of a fair cash value of at least one hundred dollars each; and there was levied by the city council of the defendant, City of Covington, upon each one hundred dollars valuation of taxable property within the corporate limits of the said city of Covington a tax of two dollars and seven cents for the year 1893, and two dollars for each of the years 1894 to 1898, both inclusive, and a tax of one dollar and seventy five cents for the year 1899, and one dollar and ninety cents for the year 1900; and there is more than two thousand dollars involved in this litigation, and the tax upon its shares of stock

asserted by said defendant City of Covington would amount to more than two thousand dollars for each and every of said years.

And your orator says that unless enjoined and restrained by this honorable court, the said City of Covington and said John N. Middendorf, city assessor of the city of Covington, will undertake to have the president or cashier of this complainant arrested by warrant from the police court of the city of Covington and the said president or cashier will be required to employ counsel and make defense, or this complainant on their behalf, and in case of proceeding by contempt complainant will be deprived of the services of its said president or cashier, and in any case their time will be taken in defending such proceeding and it will be deprived of their attention essential to its business; and the said City of Covington and its city assessor, John N. Middendorf, will undertake to assess for taxation for municipal purposes by the City of Covington all of the shares of stock of this
20 complainant for each of said years, and collect the tax so assessed and levied. And complainant says that the attempted assessment of its shares of stock and collection of taxes thereon by the city of Covington for municipal purposes, and said proposed arrest of the president or cashier of this complainant is without authority of law, and said act of the said General Assembly of the Commonwealth of Kentucky of 21st of March 1900 is in violation of, and an impairment of the obligations of the contract entered into by and between it, this complainant, and the State of Kentucky upon the 22nd of June, 1887, and as to complainant unconstitutional and void. And complainant says that said action by the City of Covington and by its city assessor, and the attempted assessment or collection of any tax whatsoever from it, or upon its shares of stock as hereinbefore stated, and said act of the General Assembly of the Commonwealth of Kentucky, approved 21st March 1900, hereinbefore referred to, in so far as it attempts to in any way authorize or empower said City of Covington to impose or collect such tax was and is null and void and contrary to the provisions of the Constitution of the United States, and contrary to section 10, article I of said Constitution of the United States, and is an attempted taking of the property of complainant and of its shareholders for public use and without due process of law, and is a taking of their property without just compensation and in violation of and contrary to the provisions of article V. of the amendments to the Constitution of the United States.

And your orator further complaining says that such assessment by defendant, City of Covington, and its assessor, John N. Middendorf, or other officer will be illegal, in violation of complain-
21 ant's contract as has been heretofore in said cause between it and said City of Covington adjudged, and will be unlawful and violative of complainant's contract, will cast a cloud over complainant's shares of stock and of its legal rights, and cause much litigation, and with no tribunal provided by law to which it can appeal for redress save the courts, and damage it and its shareholders

in a way that cannot be repaired or estimated at the common law, but its only remedy is by a bill in equity, and unless restrained by this honorable court the defendants, City of Covington and John N. Middendorf, city assessor, will attempt to assess, levy and collect taxes under said act of 21st March, 1900 and will subject complainant to the embarrassment of much litigation and cast a cloud on its shares of stock, its franchise and property and the effort will be made to arrest its president or cashier and proceed by contempt in said police court, and to collect a penalty imposed by the charter of the defendant on all delinquent tax bills.

And your orator further complaining says that all this is contrary to equity, and tends to the manifest wrong and injury of complainant in the premises; in consideration thereof and forasmuch as complainant is remediless in the premises at and by the rules of law, and can have adequate relief only in a court of equity where matters of this kind are properly cognizable and relievable.

To the end therefor- that your orator may have the proceedings on the part of the City of Covington and its city assessor to assess for taxation and collect any tax, for municipal purposes by said City of Covington, all or any of the shares of it- stock, or its property other than its real estate and banking building, for the years 1893 to 1900 both inclusive, and the proceedings to arrest the president or
22 cashier of this complainant, and thereby to compel said officer to list the said shares of stock for said purposes for said years may be enjoined, and that it may be adjudged that there is an irrevocable contract by and between this complainant and the State of Kentucky upon the continued compliance by it with the provisions of the said act of the General Assembly of the Commonwealth of Kentucky of 17th May 1886, whereby no taxes for municipal purposes can be exacted from it, or imposed upon the shares of stock or any of its property whatsoever of any kind or character, save and except its real estate and banking building where it does business, during or pending the corporate existence of complainant, to-wit:—until and including the 17th November 1904, and that said act of said General Assembly approved March 21st, 1900, in so far as it attempts to impair the validity of said contract be declared null and void and contrary to the provisions of the Constitution of the United States, your orator respectfully prays that a temporary injunction may be granted as follows:—restraining said defendant, City of Covington, and its said city assessor, John N. Middendorf, from assessing or attempting to assess for taxation for municipal purposes by the city of Covington, for the years 1893, to 1900, both inclusive, or any of them, the said shares of stock or any of it, or its capital stock, or its property of any kind or character, and from arresting or attempting to arrest said Frank P. Helm, its president, or its cashier, for failure and refusal to report to and list with the said city assessor said shares of stock for taxation for said purposes for said years; and that upon final hearing said injunction may be made perpetual; and that the contract aforesaid by and between

it and the State of Kentucky be adjudged to be irrevocable
23 during the corporate existence of complainant; and that said act of the General Assembly of the Commonwealth of Kentucky approved March 21", 1900, be declared null and void in so far as it attempts to impair the validity of the contract aforesaid and that such irrevocable contract exists between it and the State of Kentucky is *res judicata*, and that defendant, City of Covington is estopped to claim or assert that plaintiff has not such irrevocable contract.

And may it please your honor to grant unto your orator writ of subpœna, issuing out of and under the seal of this honorable court, directed to said defendants respectively therein, and thereby commanding them and each of them upon a day certain and under a penalty to be therein inserted, to personally be and appear before this honorable court, and then and there to answer the premises (but not under oath), and to stand to and abide by such orders and decree therein as to the court shall seem proper.

And may it please your honor to grant unto your orator such other and further relief in the premises as shall be agreeable to equity and good conscience.

J. W. BRYAN,
Solicitor for the Complainant.

UNITED STATES OF AMERICA, }
State of Kentucky, County of Kenton. }

Frank P. Helm, being first duly sworn, on oath says that he is the president of The First National Bank of Covington, Ky., the complainant in the above entitled cause; that he has read
24 the foregoing bill of complaint and knows the contents thereof to be true, except as to such matters as are therein stated from information and belief, and that as to those things he believes them to be true.

FRANK P. HELM.

Sworn to before me, and subscribed in my presence this 19" day of July A. D., 1900.

R. K. TARVIN,
Notary Public, Kenton County, Kentucky.

My commission expired January 8th, 1902.

EXHIBIT "A."

Exhibit "A" referred to in the foregoing bill of complaint was and is in words and figures following, to-wit:—

A. Shinkle, president. I. D. Fry, cashier.

First National Bank of Covington, Ky.

Capital, $500,000; United States depository; surplus, $160,000.

To his excellency S. B. Buckner, governor of the State of Kentucky.

SIR: We hereby certify that at a called meeting of the stockholders of the First National Bank of Covington, Ky., held at their banking house on Wednesday, June 22", 1887 (notice of time and object of said meeting having been sent to each stockholder), there were represented 3603 of the total 5000 shares of the capital stock of the said bank, and by a unanimous vote of the shares then represented, agreed and consented to accept the provisions of the act of the legislature of Kentucky, chapter No. 1233, article No. 2, passed at the session of 1886.

A. SHINKLE, *President.*
I. D. FRY, *Cashier.*

A copy.
Attest: GEO. G. COULTER, *Auditor.*

EXHIBIT "B."

Exhibit "B" referred to in the foregoing bill of complaint was and is in words and figures following, to-wit:—

STATE OF KENTUCKY.

Campbell Circuit Court.

Pleas before the Honorable C. J. Helm, judge of the Campbell circuit court, at the court house, in Newport, Kentucky, on the 2nd day of December, 1895.

FIRST NATIONAL BANK OF COVINGTON, KY., }
v. }
THE CITY OF COVINGTON. }

Be it remembered that heretofore, to-wit, on the 19" day of December, 1893, the plaintiff, First National Bank of Covington, Ky, by its attorneys filed its transcript in the clerk's office

of the Campbell circuit court against the defendant, City of Covington, in words and figures as follows, to-wit:—

Pleas before the honorable the Kenton circuit court, at the court house, in the city of Covington, on the 27" day of November, 1893.

Honorable George G. Perkins, judge.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
v.
THE CITY OF COVINGTON. } # 542.

On November 14", 1893, the said plaintiff filed the following petition and exhibits in said court:—

Kenton Circuit Court.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
v.
THE CITY OF COVINGTON. } Petition.

The plaintiff, The First National Bank of Covington, Kentucky, says that it is and was on and prior to the 17" of May, 1886, and hath ever since been a national bank organized and existing under and by virtue of the act of Congress of the United States
27 known as the national bank act and its amendments, and hath ever since its organization been and now is located and doing business in the city of Covington, Kenton county, Kentucky, that the defendant, The City of Covington is a municipal corporation under the laws of the State of Kentucky.

Plaintiff says that the Commonwealth of Kentucky, by act of the General Assembly incorporated in 1834 the Bank of Kentucky, which by this act of incorporation and amendments there was authorized to engage in the business of banking for a term ending in the year 1906; and by other acts of its General Assembly it incorporated the Northern Bank of Kentucky and the Farmers' Bank of Kentucky and other banking institutions, and by said acts of incorporation and amendments thereto authorized and empowered the said banks to engage in and do a general banking business in the State of Kentucky until the said year 1906; and it says that it was provided in the various acts incorporating said respective banks that said banks should through their respective cashiers on the first day of July in each year during the continuance of their charters pay into the treasury of the State fifty cents on each share of $100 in stock, which should be in full of all tax or bonus.

Plaintiff says that from the year 1835 up to and including the year 1886 that in pursuance of the contract thus made by the said State of Kentucky to and with said banks, all banks doing business in the State of Kentucky paid into the treasury of the State in July

of each and every year a tax of fifty cents on each one of its shares of one hundred dollars, although at no time during said
28 period was so great a rate of tax paid to the said Commonwealth upon any other species or kind of property.

Plaintiff says that beginning with the year 1882 an effort was made to subject the property of the said Bank of Kentucky, and the Farmers bank, and other banks, to the payment of local or municipal taxes in addition to the said tax paid to the said State, and subsequently an effort was made to subject national banks located within the said State to the payment also of local or municipal taxes in addition to the fifty cents on each share of one hundred dollars of its stock and that was paid to the said Commonwealth.

And it says that on and before the 17" of May 1886, suits were pending in the courts of this Commonwealth under the styles of the Bank of Kentucky against The City of Frankfort, and the Farmers Bank of Kentucky against The City of Frankfort, and The City National Bank of Paducah, Kentucky, against The City of Paducah &c., wherein it was asserted by the respective municipalities the right to subject the property of the said banks to the payment of municipal taxes, and such right being controverted by the said respective banks.

It says that the said Commonwealth of Kentucky by an act of its General Assembly, approved the 17th of May 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," and by article second thereof under the subject of "stocks in banks and other institutions" in view of the fact that under the contract it had entered into with said banks whereby, upon a payment by the banks in the State of Kentucky to it annually of fifty cents on each share of one hundred dollars of their respective stock,
29 they were exempt from the payment of any other tax or bonus during and for the period ending 1906, and in view of the said controversies then pending for judicial determination, proposed to the banks and other institutions of loan or discount within the State of Kentucky and provided as follows, to-wit:—

SECTION 1. "That shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

And further provided that the auditor of public accounts might, in his option, investigate the books of such banks or institutions for the purpose of ascertaining the surplus &c., and made said banks

and institutions subject to indictment and fine for refusal to allow such investigation to be made.

And by SECTION 2. "The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumula-
30 tions in invested, and pay into the treasury the amount of tax due."

And further imposed a penalty upon the cashier for failure to pay such tax, and required an affidavit from him stating the amount of capital stock &c. of the bank and how the surplus was invested.

SECTION 4. "That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stock-holders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement or consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of said bank."

SECTION 5. "That said banks may take the proceedings authorized by section 4 of this act at any time until the meeting of the next General Assembly:—Provided, they pay the tax provided in section 1 from the passage of this act."

SECTION 7. "If any bank, State or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution, or corporation, and its surplus, un-
31 divided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes State, county, and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations as is imposed on the assessed taxable property in the hands of individuals; provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or buildings owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Plaintiff avers that the terms and conditions of said act of 17th of May, 1886, were accepted by and the contract therein provided for entered into and made with the State of Kentucky by the said Bank of Kentucky, Farmers bank and Northern Bank of Kentucky, and

by a very large majority of all the banks, both State and national, and other institutions of loan and discount in the State of Kentucky.

Plaintiff says that within the time provided by section 5 of said act and upon the 22" of June, 1887, at a called meeting of its stockholders, a majority in interest and of a quorum of its stockholders gave their consent to the levying of the tax thus provided, and agreed to pay the same as in said law provided, and to waive and release all right of the plaintiff under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, and authorize- the proper officers of the plaintiff to so agree, consent and waive, and to make and enter into the said

32 contract upon the part of this plaintiff to and with the State of Kentucky, and to deliver to the governor of said State a writing under the seal of the plaintiff and executed by its proper corporate authorities evidencing such agreement, consent and contract to and with the State of Kentucky.

And it says that upon the 22nd day of June, 1887, it did deliver to the then governor of this Commonwealth such written agreement and consent, an authenticated copy of which is herewith filed as part hereof marked "Exhibit A."

And it says that it paid the said tax as provided in section one of said act from the passage of said act of the 17th of May, 1886.

Plaintiff says that upon the first day of July of each and every year since the passage of said act of 17th of May, 1886, and the making of said contract and agreement with the said State of Kentucky, it has made to the auditor of public accounts the report as by section 2 of said act required, and paid into the said treasury a tax of seventy five cents on each one of its shares of one hundred dollars, and on the surplus, and on the excess of surplus, as by said law provided and by said contract agreed which tax by it so paid has been accepted, received and retained by the State of Kentucky, except the tax by it paid upon the first of July, 1893, a portion of which was to it attempted to be returned as hereinafter stated.

Plaintiff says that the rate of tax assessed by the State of Kentucky upon all other real and personal estate during the years 1886, 1887, 1888, 1889 and 1890 was only forty-seven cents upon each one hundred dollars of its assessed valuation, and during the year- 1891 and 1892 the annual rate of tax upon all other real and personal estate was only forty two cents upon the one hundred dollars

33 of its assessed valuation.

Plaintiff says that upon the first of July, 1893, it made its report to the said auditor of public accounts as by said law and its contract provided, and paid into the treasury of the State the amount of tax by it owing thereon, to-wit: $4500.00 but it says that the said treasurer claiming that the said act of the 17th of May, 1886, had been repealed, and that the contract made by this plaintiff with the State of Kentucky thereunder, although this plaintiff's corporate existence has not ceased, had been by the said State of Kentucky abrogated, and retaining $3057.62 of the sum so paid in by this

plaintiff returned to it the balance with the statement that it should pay a tax at the rate of forty two and a half cents upon the one hundred dollars of the assessed value of its tangible property to the sheriff of the county of Kenton, where its said tangible property was situated, in addition to the sum so retained by him.

Plaintiff says that it at once notified said treasury of Kentucky that it held said balance so retained to it subject to the order of the said treasury of Kentucky; and it says that it now holds said balance so subject to the order of said treasury; and that it hath in no way consented or agreed to any repeal or change of the said act of May 17", 1886, or of its contract made with the State of Kentucky thereunder and in pursuance thereof.

Plaintiff says that the State of Kentucky by an act of its General Assembly which becomes a law upon the 11th of November 1892, without the signature of the governor, undertook to provide for a mode of assessing the value of what is termed "franchises of banks and other corporate institutions," and for that purpose constituted the auditor of public accounts, the secretary of state, and the
34 State treasurer a board of valuation and assessment, and provided that the tangible property of such banks and other corporate institutions should be assessed for the purpose of State taxation by the assessor of the county where such property was situated, and undertook to require of each bank and other institutions in said act named to report to the auditor of public accounts a full statement of all of its property of every kind and the value thereof; and that said board of valuation or assessment deducting from the total value of the property so reported the assessed value of the tangible property of such bank or other institutions, that the balance should be the value of the franchise upon which such bank or other institution should pay a tax of forty two and a half cents upon each one hundred dollars into the State treasury, and should pay a tax at the same rate upon the tangible property to the sheriff of the county where assessed.

Plaintiff says it refused to make any report to the auditor of public accounts and made none under the said act of the 11th of November, 1892, but complied with in every respect its contract with the State of Kentucky, as aforesaid—

Plaintiff says that the said board of valuation and assessment undertook to and did assess and fix the valuation of the franchise of that plaintiff at $719,441.30; and it says that said board claiming to be acting in pursuance of the directions, provisions and requirements of said act of the 11th of November, 1892, have certified to the defendant, The City of Covington, as the valuation of plaintiff's franchise, upon which said defendant is entitled to collect from this plaintiff a tax for the year 1893, said sum of $719,441.30; and plaintiff says that said defendant The City of Covington has undertaken to assess its alleged franchise at the rate of $2.07 on the
35 one hundred dollars for the year 1893 making the sum $14,892.43, which the said defendant is asserting is due and owing to it by plaintiff as a tax upon its said franchise, and no part

of which is claimed as a tax upon the real estate owned by this plaintiff.

Plaintiff says that it has each and every year, including the year 1893, since the making of said contract with the State of Kentucky and the passage of said act of May 17", 1886, paid to the City of Covington all taxes due or owing to it on the real estate and building owned and used by this plaintiff for conducting its business.

Plaintiff says that said defendant on the 30th. of October, 1893, demanded of it payment of said alleged — of $14,892.43 and threatens to and will, unless restrained and enjoined by this court from so doing, restrain the property of this plaintiff for said alleged tax.

Plaintiff says that the defendant, The City of Covington, is not authorized by its charter to assess any of this plaintiff's property other than its real estate or building for taxation, and it has no authority under its charter to collect or demand any tax upon any of its property of any kind or character, except upon said real estate or building.

Plaintiff says that its franchise is not subject to taxation by defendant. It says that the defendant has no right or authority under its charter to assess or tax any of its property, other than its real estate and building and upon which it has, as before stated, paid its taxes to defendant in full.

Plaintiff says that the said act of the General Assembly of the Commonwealth of Kentucky of 11th of November, 1892, and all other laws of the State of Kentucky which attempts to subject this plaintiff or its property to a different mode of taxation than that prescribed in said act of 17th of May 1886, and in said contract made and entered into by and between the said State of Kentucky and the plaintiff under and in accordance with said act of 17th of May, 1886, which contract has been faithfully kept and complied with by this plaintiff, or which in any way subjects this plaintiff or any of its property other than its real estate and building to taxation by the defendant, or authorizes or empowers the defendant to subject this plaintiff or any of its property other than its said real estate and building to the payment of any tax to the said defendant, The City of Covington, are an attempt upon the part of the said State of Kentucky to violate and impair the obligation of the contract entered into by and between said State and this plaintiff, as aforesaid, and are in violation of section ten of article one of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts, and are in violation of section twenty, article thirteen, of the constitution of Kentucky in force when said act of 17th of May 1886, was passed and said contract made, and of section nineteen of the present constitution of the State of Kentucky, which was in force when said act of 11th of November, 1892, was passed, and are, therefore, void.

36

Plaintiff prays that The City of Covington, the defendant, its officers and agents be forever enjoined and restrained from destraining or attempting to destrain any of this plaintiff's property for said al-

leged tax claim of $14,892.43 or from attempting to collect same or any part thereof from this plaintiff, and that said claim be adjudged invalid, and that it may have a judgment for its costs and for
37 all proper relief.

J. W. BRYAN,
WM. GOEBEL,
Att'ys for Pl'ff.

STATE OF KENTUCKY, }
Kenton County. }

This affiant, Frank P. Helm, says he is president of the plaintiff, The First National Bank of Covington, Kentucky, and the statements of the foregoing petition are true as he verily believes.

FRANK P. HELM.

Subscribed and sworn before me by Frank P. Helm, this 13th day of November, 1893.

R. K. TARVIN,
Notary Public, Kenton Co., Ky.

EXHIBIT.

Said exhibit is as follows:

(Copy.)

COVINGTON, KY., *Dec.* 24, 1887.

Hon. Excellency S. B. Buckner, governor of the State of Kentucky.

SIR: We hereby certify that at a called meeting of the stockholders of the First National Bank of Covington, Ky., held at their banking house, on Wednesday June 22", 1887, (notice of time
38 and object of said meeting having been sent to each stockholder) there were represented 3603 of the total 5,000 shares of the capital stock of the said bank and by a unanimous vote of the shares, then represented, agreed and consent to accept the provisions of the act of the legislature of Kentucky, chapter No. 1233, acticle No. 2, passed at the session of 1886, approved May 17", 1886.

[SEAL.]

A. SHINKLE, *Pres.*
I. D. FRY, *Cashier.*

A copy.
Attest:

VIRGIL HEWITT,
Assistant & Acting Auditor.

At the time of the filing of the petition the following bond for costs was also filed.

(*Bond for Costs.*)

Kenton Circuit Court.

FIRST NATIONAL BANK, Plaintiff,
v.
CITY OF COVINGTON, Defendant.

We undertake that the plaintiff shall pay to the defendant and to the officers of the court, all costs that may accrue to them in this action in the Kenton circuit court and in any other court to which this action may be carried.

Given under out hands this 14th day of November, 1893.

J. W. BRYAN.

Attest: H. C. HALLAM.

Thereupon a summons issued and was afterwards returned
39 as follows:—

Summons.

The Commonwealth of Kentucky to the sheriff of Kenton county:

You are commanded to summon the City of Covington to answer in twenty days after the service hereof, a petition in equity in suit numbered 542, filed against it in the Kenton circuit court at Covington, by the First National Bank of Covington, Kentucky and warn it that upon failing to answer, said petition will be taken for confessed, or it will be proceeded against for contempt.

Witness H. C. Hallam, clerk of said court, this 14th day of November, 1893.

H. C. HALLAM, *Clerk.*

Return.

Executed the within summons, November 17", 1893, by delivering a true copy of same to J. T. Thomas, mayor of the city of Covington.

DAN'L KINGSLEY, *S., K. C.*

(Fee 60 cents.)

Order: Dem'r Filed.

At a sitting of said court on November 27", 1893. "The defendant files a demurrer."

Demurrer.

The said demurrer is as follows:—

The defendant, The City of Covington, demurs to the petition because it does not state facts sufficient to constitute a cause of
40 action, nor does it state facts sufficient to support a cause of action.

WM. McD. SHAW,
City Solicitor.

Order.

Thereafter at the same sitting of said court:—

"The judge of this court declines to preside in this case on account of a personal interest in the result. By agreement the case is transferred to the Campbell circuit court at Newport."

Kenton Circuit Court.

I, H. C. Hallam, clerk of said court, certify that the preceeding — pages contain a complete and true transcript of the record in the cause named in the caption.

Witness my hand this December 15", 1893

H. C. HALLAM, *Clerk.*

Order Campbell Circuit Court.

At a circuit court on the 27th day of January 1894 order was made in words and figures as follows, to-wit:—

Came the court and filed opinion herein; and defendant's demurrer to plaintiff's petition is overruled and defendant excepts.

The opinion referred to in the foregoing order is in words and figures as follows, to-wit:—

41 FIRST NATIONAL BANK, Plaintiff,
v.
CITY OF COVINGTON, Defendant. } #10447.

Opinion.

GERMAN NATIONAL BANK, Plaintiff,
v.
CITY OF COVINGTON, Defendant. } #10449.

Opinion.

These cases are submitted upon a demurrer to the petition in each case.

The plaintiff, in each case, seeks to enjoin the defendant from collecting a local tax on a valuation of its franchises.

The tax in question was imposed upon a valuation authorized and made under article III of the act relating to revenue and taxation, which became a law Nov. 11th, 1892, and its collection is resisted upon the ground that this act impairs the obligation of a contract between the plaintiff and the State, whereby upon the payment of a given tax they are exempted from the payment of all other taxes.

If such contracts exist, whatever may be the opinion of this court as to the power of the legislature, to have made them, the repeated decisions of the court of appeals of this State, and of the Supreme Court of the United States, sustained the plaintiffs in their contention that the tax may not be collected of them,
42 and they are, therefore, entitled to the relief they pray for.

The contract is based upon the due acceptance in due form, manner and time, of the act of the legislature of this State known as the "Hewitt law" which went into effect September 14th, 1886.

That part of the act material to the question in hand is article II. The first section fixes a rate of tax on the shares of stock and surplus in State and national banks, and other institutions of loan and discount, which in the language of the act "shall be in full of all tax, State, county and municipal."

The second and third sections provide the method of ascertaining the amount of stock and surplus &c.

The fourth, fifth and sixth sections are as follows:—

SECTION 4. That each of said banks, institutions or corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidence by writing under the seal of such bank and delivered to the governor of this Commonwealth and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxations whatsoever so long as said tax shall be paid during the corporate existence of such bank."

SECTION 5. The said bank may take the proceeding authorized by section 4 of this act at any time until the meeting of the
43 next General Assembly—Provided, they pay the tax provided in section 1, from the passage of this act."

SECTION 6. This act shall be subject to the provisions of section eight (8) chapter sixty-eight (68) of the General Statutes.

Section eight of chapter sixty-eight reads thus:—

"All charters and grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1886, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed, provided, that whilst privileges and franchises so granted may be

changed or repealed no amendment or repeal shall impair other rights previously vested."

On behalf of the defendant it is not denied that this act and its acceptance constituted a contract, but it is earnestly insisted that the last section above quoted constituted a part of the contract, and made the contract binding upon the banks for all time, but binding upon the State at its pleasure only.

Mutuality is essential to all executory contracts, the promise of the one party is the consideration for the promise of the other, if for any reason one is not bound then neither is the other.

There is no reason why in respect to its contracts the State occupies any better or different position from other parties to contracts.

The plaintiff as national banks surrender rights and immunities conferred upon them by the act of the Federal Congress under which they were created, and they were substantial and valuable as set forth in the petitions herein and as known to the court as part of the current history of the State and as shown by the decisions
44 of the court of appeals in the cases of Franklin County Court *vs.* Deposit Bank of Frankfort &c. 87 Kentucky, 370, and City National Bank of Paducah *vs.* City of Paducah 10 Ky., Law Reporter, 221, and they agreed on their part to pay the increased rate of taxation and the State agreed on its part that it would pass no law that would authorize any increase of this tax. If it did not agree to do this it did not agree to do anything there in absolutely no consideration to uphold the relinquishment of its rights and privileges the banks enforced under the Federal banking laws and the statutes which existed before the acceptance of the "Hewitt law" has not been disturbed.

The State made them a proposition limiting the time in which it might be accepted, and required a formal acceptance of it. How can the court construe such a contract made by a proposition duly accepted in all its terms to include as one of them, the right of the State at its will to fail in the consideration which alone would have induced the banks to have entered into the contract. Without this construction it was an assumption of an unerased burden of taxation or peace as to a controversy with the subsequent decisions of the court of appeals in Franklin County Court *v.* Deposit Bank of Frankfort demonstrated they were right and the State wrong. With such a construction it is simply an unconscionable bargain.

The act of 1856 reserves the right to repeal or amend unless a contrary interest be therein plainly expressed.

It is claimed that the "Hewitt law" would have been governed by it without an express reference to it and that the reference to it must there*of* be held to negative any interest to waive or relinquish the right to amend or repeal.

But in this case the very subject matter forbids such a con-
45 struction unless the State give immunity from other taxation during the life of the charters of the banks they gave nothing and the contract is not binding on the banks, and as to them, as if *they* had never been a "Hewitt law." But this court will not

so construe the contract. It believes — to be a sound principle of law that where the legislature passes an act which cannot be operative as to some on its citizens against their will, and it asks their express written acceptance thereof offering an inducement therefor, nothing short of the most *expense* and implicit language will authorize it to change or repeal the act to effect those accepting its terms as required.

And, it is certain that a reference to a general law such as the act of 1856 made here will not do it.

Another reason why this tax may not be collected of these plaintiffs is, that they are national banks.

This is not a tax on the shares of their capital stock it is a tax on their franchises.

National banks are the instrumentalities of the General Government to provide a national currency.

To furnish the States to tax their franchises is to permit the States to destroy this agency of the Federal Government to accomplish the purposes of that Government.

McCullock *vs.* State of Maryland, 4 Wheat., 317.
Osburn *vs.* United States Bank, 9 Wheat., 739.

For these reasons the demurrers will be over-ruled.

And thereafter on the 31st day of January 1894 judgment was rendered in words and figures as follows, to-wit:—

46 *Judgment.*

FIRST NATIONAL BANK OF COVINGTON, KY., Plaintiff,
v.
THE CITY OF COVINGTON, Defendant.

The defendant declines to answer herein and on motion of plaintiff and defendant this cause is submitted for final judgment.

It is therefore adjudged that the defendant, The City of Covington, its officers and agents be and they are hereby forever enjoined and restrained from distraining or attempting to distrain any of the plaintiff's property for said tax claim of $14,892.43 in the petition herein set forth and from attempting to collect same or any part thereof and that the plaintiff recover of the defendants costs herein. To this judgment the defendant excepts and prays an appeal to the court of appeals which is granted.

Order.

And thereafter on the 2nd day of December 1895 mandate was filed in words and figures as follows, to-wit:—

Mandate.

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON. } #10447.

Came complainant and filed mandate of the court of appeals
47 which is as follows:

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CITY OF COVINGTON, Appellant,
vs.
FIRST NATIONAL BANK OF COVINGTON, Appellee.

JUNE 1.

Appeal from a judgment of the Campbell circuit court.

The court being sufficiently advised it seems to them there is no error in the judgment herein, it is therefore considered that said judgment be affirmed. Which is ordered to be certified to said court.

A copy.
Attest:

A. A. ADAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*

Issued October 10", 1895.

STATE OF KENTUCKY, }
Campbell County. }

I, A. L. Reuscher, clerk of the circuit court for the county and State aforesaid do hereby certify that the foregoing 25 pages of typewritten matter and this page contain a full and complete copy of the matters set out in the within styled action as the same appears of record and remains on file in my office.

Witness my hand as clerk and the seal of said court this 2nd day of July, 1900.

[SEAL.] A. L. REUSCHER, *Clerk.*

48 Exhibit "C" referred to in the foregoing bill of complaint was and is in words and figures following, to-wit:—

EXHIBIT "C."

Whereas, this the First National Bank of Covington, Ky., in 1893 instituted its action in the Kenton circuit court against the City of Covington, enjoining said city from collecting or attempting to collect any taxes from it or on its capital stock or any of its property other than its banking building, upon the ground that it had a contract with the State of Kentucky under the Hewitt law, whereby, by reason of its payment to said State of its taxes under said Hewitt law, it and its shares of stock were exempt from all other taxation, and said cause having been transferred to the Campbell circuit court, said court so adjudged and perpetually enjoined said City of Covington from asserting or from attempting in any way to collect any tax on the property of this bank or its shares of stock, except its banking building, and the City of Covington appealed from said decision to the court of appeals of Kentucky, and the said judgment of the said Campbell circuit court was by said court of appeals affirmed on June 1", 1895 (97 Kentucky page 590), said court of appeals holding that this bank had such irrevocable contract with the State of Kentucky under the Hewitt law; and

Whereas it has by the Supreme Court of the United States been held in the Bank Tax cases from Kentucky, October term, 1898, vol. 174, U. S. Supreme Court Reports, that—

"An adjudication that an irrevocable contract exists, which precluded the enforcement of a tax law in conflict with the contract, is *res judicata* as to an attempt to enforce such tax law in
49 succeeding years against the parties to such an adjudication."

And as this bank has continued up to the present and intends to so continue to pay its taxes to the State under said Hewitt law, the said City of Covington has no right to assess for taxation its shares of stock or any of its property other than its banking building, and this bank is in no way subject to the provisions of senate bill, No. 188 of the 1900 session of the Kentucky legislature, and its president and cashier are directed for these reasons not to list with the city assessor of Covington for taxation any of its shares of stock.

Exhibit "D" referred to in the foregoing bill of complaint was and is in words and figures as follows, to-wit:—

EXHIBIT "D."

COVINGTON, KY., *June* 20", 1900.

Mr. Frank P. Helm, president First national bank.

DEAR SIR: Under the late act passed by the last legislature of Kentucky, "in relation to the taxation of national banks," it is my duty to assess all shares of stock in national banks in this city.

You are hereby notified and directed to report to me on or before the 30th day of June, 1900, at my office. 153 Pike street,
50 Covington, Kentucky, and to list with me for taxation for municipal purposes all shares of stock in the First national bank, of which you are president, for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899 and 1900.

JOHN N. MIDDENDORF,
City Assessor.

And on the same day, to wit, on June 23rd., A. D. 1900 subpœna in chancery was issued herein which was and is in words and figures following, to-wit:—

Subpœna in Chancery.

The President of the United States of America to the City of Covington, a municipal corporation, and John N. Middendorf, the assessor of the city of Covington, Greeting:

You are commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal Court hall, in the city of Covington, on the first Monday in September next, to answer a bill in equity exhibited against you in our said court by the First National Bank of Covington, Ky., a corporation, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of said court, in Covington, this 23rd., day of July, A. D. 1900, and in the 125th year of our Independence.

JOS. C. FINNELL,
C. C. C., K. D.

51 [SEAL.]

MEMORANDUM.—The defendants to enter their appearance in the suit in the clerk's office, on or before the 3rd. day of September next, the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

JOS. C. FINNELL, *Clerk.*

And on the same day, to-wit, on July 23rd., A. D. 1900, a motion for injunction was filed. This motion cannot be found in the record, but there is in the record an acceptance of a notice of said motion, filed on July, 1900, which is as follows:—

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK
v.
CITY OF COVINGTON.

Notice of Application for a Temporary Injunction.

The defendants, City of Covington and John N. Middendorf, city assessor of said city of Covington, are each hereby notified that the complainant will, upon Tuesday, the 31st. day of July, 1900, at 12.15 p. m. in chambers, at the Federal building, in the city of Louisville, Kentucky, apply to the Honorable Walter Evans, judge of the United States circuit court for the district of Kentucky, for a tem-
52 porary injunction in accordance with the prayer of the bill of complaint herein.

J. W. BRYAN,
Solicitor for Complainant.

Service of the above notice accepted for the defendants, City of Covington and John N. Middendorf, city assessor of said city of Covington.

F. J. HANLON,
Solicitor for said Defendants.

Return on Subpœna.

And on a day following, to-wit: on July 27th, A. D. 1900, the subpœna in chancery issued herein on the 23rd day of July, A. D. 1900 was returned to the clerk's office of said court with the marshal's proceedings thereon endorsed in words and figures following, to-wit:—

"I hereby certify that I received this writ on the 23rd of July, 1900, and that I have personally served the same, on the 24th day of July, 1900, upon the said defendants, The City of Covington, by delivering to W. A. Johnson, its mayor, a true copy of the within, and upon John N. Middendorf, assessor of the city of Covington, by delivering to him a true copy of the within on the 25th day of July, 1900. This, therefore, returned executed as the law directs this 23rd day of July, 1900.

A. D. JAMES, *U. S. M.*,
By J. D. COMPTON, *D. M.*

53 And on a day following, to-wit, on August 14th. A. D. 1900 an entry was made herein which was and is in words and figures following, to-wit:—

Entry Journal "H," page 660.

This day came the plaintiff, by J. W. Bryan, its counsel, and, with leave of the court, filed its amended bill of complaint herein, with an exhibit therewith attached, and moved the court for a temporary injunction restraining the defendants from assessing or collecting any taxes for municipal purposes from complainant or any of its shareholders until the further order of the court. Pending said motion the defendants came, by F. J. Hanlon, W. H. Julian and Harvey Myers, their counsel, and, with leave of the court tendered and filed a plea to the jurisdiction of the court of this action, and, with leave of the court, were also permitted now to file a demurrer to the bill of complaint, as amended, but neither said plea nor said demurrer was set down for argument; and the said motion of the complainant for the temporary injunction aforesaid coming on to be heard was argued by counsel, and the court, being sufficiently advised, delivered an opinion in writing, which is ordered to be filed, and pursuant thereto it is ordered, adjudged, and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March, 21, 1900, and the said defendants, until the further order of the court herein, are also
54 restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a higher rate than is permitted by law and to what extent.

Service of this order shall be made upon the defendants by delivering to each of them a copy hereof.

And on the same day, to-wit: on August 14th, A. D. 1900 an amended bill of complaint was filed herein which was and is in words and figures following, to-wit:—

Amended Bill of Complaint.

The Circuit Court of the United States for the District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
vs.
THE CITY OF COVINGTON ET AL., Defendants. } In Equity.

The complainant, by leave of court first had and obtained, amends its bill of complaint herein as follows, to-wit:—

Your orator says that by mistake it was stated in its original bill that during years 1893, 1894, 1895, 1896 and up to
55 first of July 1897, its capital stock was five hundred thousand ($500,000.) dollars, when the amount of its capital stock during said period was six hundred thousand ($600,000.) dollars.

Your orator says that said act of the legislature of Kentucky of March 21", 1900, set forth in its original bill herein, is invalid and void and obnoxious to and inconsistent with the provisions of section 5219 of the Revised Statutes of the United States. Said act of March 21, 1900, is not in conformity with said section 5219 of the Revised Statutes aforesaid in that the said act by section two thereof undertakes to make complainant, and other national banks in the State of Kentucky, liable for the taxes to be assessed against and collected upon the shares of stock thereof; and by section three of said act, it is undertaken to authorize and empower the defendant, City of Covington, and said defendant has the right, power and authority thereunder to assess the shares of stock of this complainant for all the years from 1893 to the present year 1900, both inclusive, as well as in the future, and to make complainant liable for said taxes, notwithstanding the fact that complainant, as in its original bill set forth, has regularly paid its taxes as by its said contract agreed, and in accordance with the provisions of the Hewitt law, each and every of said years, to the State of Kentucky, and notwithstanding the fact that the capital stock of complainant was decreased from six hundred thousand ($600,000.00) dollars, to three hundred thousand ($300,000.00) dollars upon the first day of July 1897, and complainant paid one hundred ($100.00) dollars upon each share of said reduction of three hundred thousand ($300,000.00) dollars, to the owners of the said shares of stock of complainant at said time; and that complainant hath regularly during each and every of said years, semi-annually, paid to its then shareholders, its current earn-
56 ings and profits by way of dividends; and notwithstanding the fact that many of the shares of stock of complainant have changed ownership during said years, and in many instances during said time holders and owners of its shares of stock have died and their said stock has been distributed among their heirs or

legatees, and in other instances sold and the proceeds applied to the payment of the debts of its said shareholders; and during said years many of its shareholders were non-residents of the State of Kentucky, who in many instances have sold and transferred their shares of stock during said time; all of which statements complainant avers to be true. During said years there was no law in the State of Kentucky providing for the assessment of its shares of stock or any law authorizing municipal taxation thereof.

Your orator further complaining showeth unto your honor that said act of March 21, 1900, undertakes to and does discriminate against complainant and other national banks in the State of Kentucky, and deprives them of the equal protection of the laws, for that, it says that there is not now, and has not been during any of said years, any statute or law in Kentucky under which the shares of stock in State banks are to be assessed or taxes collected thereon, as is attempted to be done upon shares of stock in national banks located in Kentucky, by said act. And your orator further shows that the only general law in the State of Kentucky, under which the State banks are assessed for taxation, is the revenue law of 1892, the provisions of which are set forth in its original bill herein, under which said State banks are assessed for and pay a franchise tax, the amount thereof being ascertained by the said State board of valuation and assessment, as in its original bill set forth. Your
57 orator says that the legislature of Kentucky by an act approved March 19, 1898 (Session Acts 1898, page 96, of the General Assembly of the Commonwealth of Kentucky), provided that the franchise of all banks, State and national, in cities of the first and second class, should be assessed for taxation for city purposes, by such city officer as made the assessment for taxation in said cities. That is, that act conferred upon such cities the power of assessment given by the revenue law of 1892 to the State board of valuation and assessment. And your orator further shows that the legislature of Kentucky by an act which became a law upon March 23, 1900, without the signature of the governor (Session Acts, page 89) amended said act of 1898, by which amendment it was undertaken to authorize the assessment for taxation by cities of the first, second and third class in Kentucky, of the shares of stock in every incorporated bank located in said cities, while the said act of March 21, 1900, under which the defendant, City of Covington, is attempting to proceed against complainant provides for the assessment for taxation of the shares of stock of all national banks in the State of Kentucky wheresoever located, being entitled "An act relating to "taxation of the shares of stock of national banks," and while the shares of stock in State banks assessed only in cities of the first, second and third class in said State. And your orator says that there are many State banks located in and doing business in the State of Kentucky outside of cities of the first, second and third class.

Wherefore, your orator says that said act of March 21st, 1900 is not in conformity with, but is contrary to the laws of the United States relating to national banks, and is a discrimination against

complainant, and other national banks located in the State of Kentucky. And complainant further says that said act is in-
58 valid, illegal and void, and contrary to the provisions of the Constitution of the United States in that it is an attempted impairment of the obligations of the contract between complainant and the State of Kentucky, and an attempted taking of the property of complainant without due process of law, and a taking of the private property of complainant and its shareholders for public use without just compensation, which is in violation of the provisions of articles V. and XIV. of the amendments to the Constitution of the United States, and an attempt to enforce said act of March 21, 1900, would be an abridgment of its privileges and immunities and a denial to it of the equal protection of the laws, and in violation of article XIV. of the amendments to the Constitution of the United States.

And your orator files herewith as part of this and its original bill, as evidence in this case, a certified copy of all the orders, the judgment and opinion and holding by the court of appeals of Kentucky upon the said appeal by the defendant herein, City of Covington against complainant, referred to in complainant's original bill, and marks said copy Exhibit "X."

Wherefore, your orator prays your honor to grant unto it the injunction asked in its original bill restraining and enjoining the said City of Covington and all of its officers from in any way assessing or attempting to assess for taxation by said city the shares of stock of complainant, or any of them or to hold complainant liable for the taxes thereon for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899 and 1900, or any of said years, or for any future year or years; and prays that it be adjudged that the contract entered into by and between it and the State of Kentucky, whereby its shares of stock and all of its property, other than its banking building and real estate, are exempt from any taxation by the defendant City of Cov-
59 ington, for and during its corporate existence, was an irrevocable one, and that such contract is irrevocable is *res judicata;* that said act of the legislature of Kentucky of March 21, 1900, be declared illegal, null and void, in whole and in part; that it may have judgment for its costs. It prays as in its original bill, and for any and all other and further relief that to it in equity and good conscience belongeth in the premises.

J. W. BRYAN,
Solicitor for the Complainant.

UNITED STATES OF AMERICA, }
State of Kentucky, County of Kenton, } ss:

Frank P. Helm makes oath that he is the president of The First National Bank of Covington, Ky., complainant herein, and that the statements made in the foregoing amended bill of complainant as of his own knowledge are true, and those on information he believes to be true.

FRANK P. HELM.

Sworn to and subscribed before me by Frank P. Helm on the 9th day of August, 1900.

R. K. TARVIN,
[SEAL.] *Notary Public, Kenton Co., Ky.*

My commission expires January 8th, 1902.

And on the same day, to-wit, on August 14th., A. D. 1900, Exhibit "X" referred to in the foregoing bill of complaint was filed herein which was and is in words and figures following to-wit —

60 EXHIBIT "X."

Pleas before the honorable court of appeals of Kentucky, at the Capitol, in Frankfort.

At a court of appeals held in and for the Commonwealth of Kentucky, as aforesaid, on the 25th day of October, A. D. 1894, the following order was entered herein:

Order.

CITY OF COVINGTON
vs.
FIRST NATIONAL BANK OF COVINGTON. } Campbell.

Ordered that the foregoing causes be continued for oral argument.

Afterwards, to-wit, on the 5th day of March, A. D. 1895, the following order was made herein and in consolidated causes:
By agreement of all the parties and on their motion, it is ordered that these 17 causes be heard together and said causes coming on to be heard were argued by A. P. Humphrey for the banks and Ira Julian for the Commonwealth, counties and cities and laid over until tomorrow for further hearing.

Afterwards, to-wit, on March 6th, A. D. 1895, the following order was entered herein and in the consolidated causes:—

61 *Order.*

These causes again coming on to be heard were argued by D. W. Lindsey for the bank and Wm. McD. Shaw and Hugh Rodman for the counties and cities and laid over for further hearing on to morrow.

Afterwards, to-wit, on March 7th, 1895, the following order was entered herein and in the consolidated causes:

These causes again coming on to be heard were argued by Wm. Goebel for the banks and H. C. Barker for the cities and counties, and laid over for further hearing on tomorrow.

Afterwards, to-wit, on the 8th. day of March, A. D. 1895, the following order was made herein and in the cases consolidated with it:

Order.

These causes again coming on to be heard were argued by John W. Rodman and T. L. Edelen for the banks and laid over for further hearing on tomorrow.

Afterwards, to-wit, on the 9th day of March, A. D. 1895, the following order was entered herein, and in the cases consolidated herewith:

Order.

These causes again coming on to be heard were argued by James P. Helm for the banks and laid over for further hearing on next Tuesday.

62 Afterwards, to wit: on the 12th day of March, A. D. 1895, the following order was entered herein and in the causes consolidated herewith:

Order.

These causes again coming on to be heard were argued by W. J. Hendrick for the Commonwealth and submitted.

Afterwards, at a court of appeals held as aforesaid on the 1st day of June, A. D. 1895, the following judgment was entered:

Judgment.

CITY OF COVINGTON, Appellant, vs. FIRST NATIONAL BANK OF COVINGTON, Appellee.	Appeal from Campbell Circuit Court.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein. It is therefore, considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended. Judges Lewis, Paynter and Guffy dissenting.

The following is a copy of the opinion delivered by the court through Chief Justice Pryor on the 1st day of June, 1895.

63 *Opinion.*

The Bank of Kentucky, the Northern bank, the Farmers bank and other State banks, the National Bank of Covington and other national banks are in this court by their presidents and directors, some of them appealing from judgments imposing upon them taxation for county and municipal purposes, and others standing as appellees in cases relieving them from such local burdens.

The legislature imposing such burdens is found in the Kentucky statutes under the title of revenue and taxation, and is based on secs. 174 and 175 of the present constitution.

Section 174 provides:

"All property whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises."

Section 175 provides:

"The power to tax property shall not be surrendered or suspended, by any contract or grant to which the Commonwealth shall be a party."

It is manifest by reason of section 175 the right of the legislature no longer exists of surrendering the power to tax property, or by contract to bind the State to any other mode of taxation than that found in the constitution, and all property, whether belonging to corporations or individuals, must pay the same rate of taxation.

The appellants in these cases (the banks) are claiming that prior to the adoption of the present constitution a contract had been entered into between them and the State, by which, in con-
64 sideration of the surrender by them of certain rights found in their respective charters, and by their consent and agreement to pay a larger State tax than individuals paid, or their charters required, the State agreed not to impose upon them any local burdens, and the important inquiry in these cases is: Was such a contract entered into between the banks and the State based on a consideration, binding the State on one side and the banks on the other?

The statute under which this contract is claimed to have been made is found in the general statutes under the title of revenue and taxation, secs. 1 and 4 or art. 2, and known as the Hewitt bill. Counsel for the banks in the discussion of these cases classified the banks as follows:

1. The banks chartered prior to the act of 1856, when the power to amend or repeal was not a part of the charter or reserved by any general law.

2. Banks chartered after that date, when by a general law the right to amend or repeal the charter was expressly reserved.

3. The national banks.

We shall treat all the cases as one in considering the application of the Hewitt act to the banks accepting its provisions.

Prior to the adoption of the present constitution it seems to have been the settled policy of the State to exempt banking institutions from local taxation, and requiring them to pay a larger tax to the State upon its property than that paid by the individual tax-payer, and this additional tax went into the State treasury instead of being applied to municipalities in the discharge of local burdens. The framers of the constitution, not approving of this policy, established a fixed rule of taxation and made all taxation alike upon property, whether for State or municipal purposes, applying the rule for municipal purposes to the territory in which the tax is im-
65 posed. It is argued, and no doubt true, that a discrimination must exist between banks located where heavy local burdens are imposed, and like institutions in more favored localities, where lighter or no local burden exists, and while the fact that the banks in the commercial centers of the State are taxed two and a quarter dollars on the hundred, under the pres- system (local and State), and those in an adjoining town or county only one per cent., may work a hardship, and prevent competition, or drive the banks thus heavily taxed to locate elsewhere, yet this, under the old system, was a question of policy only, and the framers of the present constitution, in adopting the *ad valorem* system, left no room for classifying property, so as to make any discrimination in the subjects of taxation, and the suggestion of counsel can only be considered in determining the intent of the legislature in passing the Hewitt act and that of the banks in accepting it.

It may be well, however, to ascertain the condition of the banks (and particularly those chartered before the year 1856), with reference to taxation, and the circumstances attending the legislation resulting in the passage of the Hewitt bill, in order to ascertain whether or not it was the purpose of the State to surrender in part its power of taxation, and that of the banks to relinquish any right they could have asserted against the State by reason of their charters. The banks in existence prior to the act of 1856 were claiming their charter contracts by which only a tax of fifty cents on each share of one hundred dollars of stock could be imposed.

The national banks claimed they were entitled to be taxed like the State banks, and were not liable for local burdens, and, besides, that their surplus, if in greenbacks or other non-taxable securities, could not be taxed under their charters from the Federal Government.

The State claimed the old banks were taxed for too small an

amount, and the banks chartered since the year 1856 were
66 resisting any discrimination between such institutions and the old banks. Under these circumstances the legislature devised a mode of taxation that prevented a discrimination that would otherwise exist, and by the provisions of the Hewitt bill said to all banks, State and national, we will impose a tax of seventy-five cents on each share of your capital stock equal to one hundred dollars, and in addition a tax on your surplus, and this shall be in full of all tax, State, county and municipal, provided you will accept the act imposing the tax with the conditions annexed.

This act reads:

"Shares of stock in State and national banks and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to one hundred dollars of stock therein, owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay *one* each one hundred dollars or so much of their surplus, undivided surplus, undivided profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The seventh section of the act further providing that: "Nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and minicipal purposes as other real estate is taxed."

67 Section 4 of this act provides:

"That each of said banks, institutions and corporations, by its proper corporate authority with the consent of a majority in interest of a quorum of its stockholders at a regular meeting thereof, may give its consent to the levying of said tax, *and agree* to pay the same as herein provided, *and to waive and release all right under the act of Congress*, or under the charters of the State banks, to a different mode *or smaller rate of taxation, which consent or agreement with the State of Kentucky* shall be evidenced by writing under the seal of such bank, and delivered to the governor of this Commonwealth, *and upon such agreement and consent being delivered and in consideration thereof*, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid, during the corporate existence of such bank."

Section 5 of this act provides:

"The said banks may take the proceedings authorized by sec. 4 of this act, at any time, until the meeting of the next General Assembly: Provided, they pay the tax provided in sec. 1, from the passage of the act."

Section 6 provides:—

"This act shall be subject to the provisions of section 8, chapter 68, General Statutes."

The banks involved in this litigation accepted in writing the provisions of the act and filed their written acceptance with the governor under their corporate seals. The banks incorporated before the act of 1856 surrendered what they claimed to be their
68 charter contracts, by which they were taxed only fifty cents on their shares of stock of one hundred dollars. The national banks yielded their right to deduct from the value of their stock their surplus consisting of non-taxable securities, and their claims to be taxed as the old banks, and most of the State banks uniting to prevent any discrimination, all accepting the proposition made by this State, and agreeing to pay seventy-five cents on each share of stock of one hundred dollars in value, and the additional tax mentioned in the article.

It is conceded by counsel for the City of Louisville (and we think it clear) that prior to the passage of the Hewitt bill, in the year 1886, the Bank of Kentucky had an irrevocable contract to be taxed at the rate of fifty cents on each share of one hundred dollars, and the same may be said of all the banks chartered prior to the act of 1856; but it is further contended that the act, as well as the contract under it, were both subject to repeal by reason of the reserved power contained in section 6 of art. 2. Again it is contended by counsel for the City of Frankfort that the grant to the banks was without any consideration, and the renewals of the charter of the old banks, as they are designated, placed them within the provisions of the act of 1856, and by the attorney general that the State had no power to surrender this right of taxation, and the contract, if made, is not binding.

This court, in the case of the Franklin County Court *v.* Bank of Kentucky, reported in 87 Ky., 370, in an opinion delivered by Chief Justice Bennett, held that the renewals of those charters did not affect the contract made with the State under the original grant, and if disposal to reconsider the decision rendered in that case, it could not effect the issue involved on the present appeals.
69 At the date of the passage of the Hewitt bill the Franklin circuit court had declared that the charter contract still existed, and after the acceptance by the banks of the provisions of the Hewitt bill that court affirmed that judgment. It is apparent that art. 2 in the Hewitt bill was adopted by the legislature with a view of equalizing the burdens of taxation as between the banks and to relieve them from the burden of local taxation during their corporate existence, but it is insisted there was no consideration for this partial exemption.

*I*t there was a binding contract between the *old banks* and the State to pay a tax of only fifty cents on each share of stock, and these banks surrendered their contract, or their right under it, and agreed to pay seventy-five cents to the State instead of forty-two and one half-cents, it seems to us this would be a wise consideration, sufficient to uphold any such contract with the State, if the power existed with the State to make it, and the fact that such a power existed has been too often decided by this court, as well as the

Supreme Court, to require authority in support of it. It is plain also that these banks, including the national banks, surrendered their rights, not only to settle the question as to local taxation, but to prevent competition or any discrimination between banks located in the commercial centers of the State and those outside of such localities, while no heavy burdens for local taxes were being levied, and, therefore, the consideration moving from the old banks was for the benefit of all the banks accepting the terms of the contract. The legislature was attempting to avoid all discrimination between these monied institutions and, therefore, its exactions from
70 the old banks and the national banks acceded to, it resulted to the benefit of the banks organized after as well as before the act of 1856, as to such banks uniting with the old banks in accepting the Hewitt bill. In this statute, imposing the tax of seventy-five cents and its acceptance on the conditions proposed, there exists every element of a contract between the State and the banks, and with such a consideration as will uphold it, no reasonable doubt can be entertained that such was the purpose of the parties to it.

It is contended that if a contract was entered into, the provisions of the present constitution, and subsequent legislation under it, operated to repeal not only the statute, but the contract made by virtue of its provisions, and this power existed by reason of the sixth section of the article, making it subject to the provisions of sec. 8, chap. 68, General Statutes, declaring that this,

"Shall be subject to amendment or repeal as the will of the legislature, unless a contrary intent be plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

Assuming, and as we think was the legislative intent, the word *act* in section 2 of the Hewitt bill was used as synonymous with the word *article*, and, therefore, the reservation of the power on the part of the legislature was the right to amend or repeal the article in which is contained the proposition by the State to the banks, in reference to taxation, it by no means follows that a contract made by virtue of its provisions can be abrogated at the will and pleasure of the legislature. The distinction between the power of the legislature to repeal an act, and the right to annul by repeal or
71 otherwise a contract made under it, is manifest, and while under our present constitution the State can make no contract, by which the exercise of the taxing power can be lessened or any part of its sovereign power in that regard relinquished, under the former constitution property might not only be classified in imposing taxation, but the State could discriminate between the classes when providing the rate of taxation, and this doctrine has been recognized by numerous decisions of this court and sustained in like cases by numerous decisions of the Supreme Court.

The general rule in regard to legislation is, that one legislative body can not bind a subsequent legislature to its action in purely

legislative matters. but when it comes to matters of contract, if the State has the power to make it, its terms and conditions are as obligatory on the State as if entered into between two of its citizens and an attempt to cancel such a contract, without the consent of the party with whom it is made, is in direct violation of that clause of the Federal Constitution providing that "no State shall * * * pass any law impairing the obligation of contracts." (Section 10, art. 1, U. S. Const.)

That the State may enter into such contracts was held by this court as early as the year 1839, in the case of Johnson *v.* Commonwealth, reported in 7 Dana, 342, where there was an effort to tax the shares of stock in a bank, in excess of the terms of the contract, and this court held that the contract placed a limitation on the power.

In the case of the Farmers' Bank *v.* Commonwealth, reported in 6 Bush., 127, it was held the bank could not be taxed beyond
72 its charter rate, as fixed by the contract, and in the late case of The City of Frankfort *v.* The Bank of Kentucky, and others, reported in 87 Ky., 370, the same doctrine was announced.

The question then arises—Did the reservation of the power to amend or repeal this article of the Hewitt law empower the legislature, or the framers of the constitution, to disregard this contract between the banks and the State? We are satisfied, after a careful consideration of this question, that the parties making it never contemplated or intended that the act of 1856 should apply to this contract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties. The legislature, at the time this contract was made, recognized the right of the Bank of Kentucky, and the banks chartered prior to 1856, to stand upon their charter rights, or if not the right of the banks as against the State on this subject of taxation had found its way to the courts, and had been decided adversely to the State. The legislature thought the tax of fifty cents too small. The old banks claimed an irrevocable contract. The national banks could only be taxed as authorized by the Federal Congress. The new State banks were subject to such taxation as the State might see proper to place upon them, and to make them liable for these local burdens would be to end their existence, or cause them to seek shelter under the Federal banking act, and with a view of placing the entire matter at rest, and placing the banks on an equal footing, the legislature said to all of the banks:

"If you will agree to pay seventy-five cents on each share of stock equal to one hundred dollars, etc., it shall be in full of all tax, State, county and municipal."

It said to the old banks:

73 "You must relinquish your right to a smaller rate of tax, and this must be done, not by your president and directors, but by the consent of the stockholders, in writing, and delivered to the governor as evidence of your good faith."

The banks accepted the proposition made them in the manner pointed out by the act, and from that time to the adoption of the present constitution, the contract was adhered to by both the State and the banks. It is now argued the banks, and particularly those with charter contracts for a smaller rate of taxation, surrendered those charter rights and agreed to pay a higher rate of tax under an act that authorized any subsequent legislature to repeal the contract at its will and pleasure. No rational view of this agreement should lead to the conclusion that business at the head of these institutions would relinquish every right they had acquired under their charters, that an increased burden might be placed upon the banks they represented.

In the contention that the sixth section of the article reserves this power of repeal, counsel overlook the fact, that by the express terms of the section by which this reserved power is retained, it is provided that "*no amendment* or repeal shall impair other rights previously vested." The execution of the agreement between the State and the banks, based on a consideration such as appears from the act itself connected with its acceptance by the banks, vested in the latter rights of which they could not be divested without their consent, the chief of which was the payment of a specified tax to the State during their corporate existence,

The State waived its right to tax these banks for local pur-
74 poses (except their realty), and required in lieu thereof an additional tax to be paid into the State treasury. In this way the State granting the franchise derived the benefit instead of the municipal government, while under the present system, the difference between forty-two and one-half cents and seventy-five cents, with tax or surplus amounting to one hundred and twenty-five thousand dollars, is taken from the revenue proper, and applied to the municipalities where the banks are located.

In the case of Commissioners of Sinking Fund *v.* Green & Barren River Navigation Company, reported in 78 Ky. 73, this court *had*, with the act of 1856 in full force, that the State had no power to annul a contract that had been executed between the State and the company, and that the repeal of the charter to the extent it deprives the company of its contract rights acquired under it was in violation of the constitution. In that case the court said:

"We can not assent to the doctrine that will allow the State to alter or abolish such contracts, whenever, in the opinion of the legislature, the necessities of the public or the interest of the State require it."

The case of The Commonwealth *v.* Owensboro &c. R. Co., 95 Ky., 60, determines in effect the question involved here. In the year 1884 the legislature passed an act to encourage the construction of railroads, and in doing so relieved them from taxation for a limited period. The act provided:

"That all railroads which may hereafter be built within this Commonwealth under existing charters, or under charters which may

hereafter be granted, shall be exempt from all taxation under
75 the laws of this Commonwealth for the period of five years, from the date of the beginning of the construction of the new roads."

The State claimed the right under the act of 1856 to repeal the law, claiming this had been done by legislation, as in the case before us, and attempted to coerce payment of taxes, when the five years from the beginning of the construction of these roads had not expired.

The court, in response to the argument to exact the tax, and the application of the act of 1856 to its provisions, said:—

"It is sufficient to say of this proposition, which even at first blush strikes us as extraordinary and unjust, if attempted to be applied to those of the appellees who accepted the offer of the State, and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend charter privileges granted by the legislature to particular persons, has no application to the law of 1884, which, as said before, was a general law and affected all alike who accepted its provisions or acted on the strength of them."

Counsel for the local governments argue the questions involved as if there was a perpetual grant to these corporations, and, therefore, the power of repeal must of necessity have been reserved. The limitation of the grant extends to the life of the corporate charter, and with the banks existing prior to the act of 1856 their charters expire in ten or twelve years, and hence the policy of the State, if viewed in that light, was wise, because it was increasing the State revenue from fifty to seventy-five cents for a fixed and certain period.

76 The framers of the constitution in adopting that instrument were not looking to past legislation on this particular subject, but were creating an original law for the future welfare of the State, leaving the rights of those protected by either the State or Federal constitutions undisturbed, and if the attempt to repeal vested rights had been made, the framers of the present constitution would have been as powerless to accomplish such a purpose as the legislature in session after its adoption.

The Supreme Court decided a somewhat similar question on a writ of error to the court of appeals of New Jersey, in the case of New Jersey *v.* Yard, reported in 95 U. S. 110, by an act of the legislature, passed in March, 1865, the legislature of New Jersey enacted that the Morris & Essex Railroad Company should pay a tax of one-half of one per cent., to be paid by the company to the State whenever the net earnings of the company amount to seven per cent. on the cost of the road, to be paid at the expiration of one year from the time when the road shall be open, and in use to Philipsburg, and annually thereafter, *which tax shall be in lieu and satisfaction of all other taxation and imposition whatever, by or under the contracts of this State.*

The twentieth section of the original act of incorporation reserved to the legislature the right to alter, amend or repeal the act when-

ever it should think proper. The act of 1865 was an amendment to the original grant and in regulating the amount of taxation contained this proviso:

"*Provided*, That this section shall not go into effect, or be binding on the company, until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the secretary of state, shall have signified its assent thereto, which
77 assent shall be signified within sixty days after the passage of this act, or this act shall be void."

Chief Justice Miller in delivering the opinion in that case said: "The main question here is, did the legislature intend to make such a contract," and held that "its meaning and its terms are clear enough, and, taken alone, no one denies but that it is a contract which would be protected by the Constitution of the United States." And in like manner will the contract in question be upheld.

And, as said by Mr. Justice Miller in New Jersey *v.* Yard:

"The legislature was not willing to rest this contract in the usual statutory form alone, depending on its validity as a contract upon some action of the corporation under it to bind it to its terms; but they required of the company a formal written acceptance within sixty days, else it became wholly inoperative."

And it may be said in the New Jersey case there was no consideration other than is found in ordinary railroad charters.

It is said, however, in that case, the repealing clause, or what is known in this State as the act of 1856, was appended to the original charter, and when amended it formed no part of the amendment, as is found in this case, and, therefore, the court concluded the amendment was not subject to repeal.

The question is asked, why the necessity of making the act of 1856 apply to article 2, if the legislature did not intend to reserve the right of annulling the contract? In response to this it might be asked, if such was the legislative intent, why the necessity of having a formal written acceptance from the banks surren-
78 dering all their respective charter rights, and in consideration therefor agreeing to tax them seventy-five cents on the hundred dollars, so long as their charters continued, if the power was reserved of abrogating the contract at any moment. If such was the legislative purpose there could have been no necessity for any consideration moving from the banks, or any formality attending the execution of the contract.

The act of 1856 was enacted to avoid the effect of the decision of the Supreme Court in the Dartmouth College case, reported in 4 Wheat., 518, to enable the sovereign power to amend and repeal charter provisions that had theretofore been regarded as beyond the power of the legislature, without such a reservation, but under this act of 1856, it has been held by this court, as well as every other court having the question before it, that property rights or contract rights, acquired by virtue of the charter in exercising the privileges conferred, could not be interferred with by legislation, and, in fact, the act expressly provides "that whilst privileges and franchises so

granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The old banks had contract rights sustained by the adjudications of the courts of the State that exempted them from local taxation, and the same adjudication was had in regard to national banks, although the cases as to the national banks were decided subsequent to the passage of the Hewitt bill. (City National Bank of Paducah *v.* The City of Paducah, 10 Ky. L. R. 221; Covington City National Bank *v.* City of Covington, 21 Fed. Rep., 484.)

The legislature saw the obstacle in the way of increasing the taxation on these banks, and the national banks, standing on
79 the same footing with the State banks, it became apparent that it was to the interest of the State to hold out inducements to all the banks, that equality as between them might exist, and, at the same time increase the taxation. The banks had not asked for any amendments to their charters, nor was the effort made by the legislature to repeal or amend the charters. The State was attempting to enact a general law, entitled revenue and taxation, applying to all subjects of taxation, and to all kinds of property. The tax in regard to banks, under this general title, was fixed at seventy-five cents as to all banks, *and as to all corporations*, required by law to be taxed on their capital stock, and as to the old banks and the national banks, the surrender of these rights was made to depend upon their acceptance of the proposition made to them by the State, by the terms of which they were to pay the tax imposed by the Hewitt bill, and be released from other taxation, so long as their charters continued.

Why, then, did the legislature annex to *article 2*, of the revenue bill, the provisions of the act of 1856? No contract had been made when the bil- passed, as there had been no acceptance by the banks, and not until the adjournment of the legislature was the contract consum-ated. It was provided in article 2 that the acceptance had to be made before the legislature again assembled, and the act of 1856 could only have authorized the reservation of power to repeal or withdraw this proposition, if, within the period fixed, there was no acceptance by any of the banks of its provisions.

The right to the franchise or the exercise of the privileges granted was not involved in the legislation, but the banks, with their charters in full force, were asked by the legislature to make an agreement as to a rate of taxation, that could not have otherwise been enforced against either the old banks or the national banks.

80 The corporations had the right to contract by reason of their charters, and, dealing at arm's length with the State, accepted the terms and conditions offered in good faith, and the question here is, not the right of the State to repeal or amend their charters, but the right of the State to cancel this contract without the consent of the banks.

The right of the State to repeal the franchise, or amend the charter, is not here questioned, when subject to the act of 1856, but the repudiation of a contract will not be sanctioned.

There was, in fact, necessity for the State to apply the act of 1856 to article 2. Other corporations, as well as banks organized since 1856, were liable to this tax, whether they accepted the provisions of the Hewitt bill or not; and section 4 was inserted for the express purpose of creating a contract between the old banks and the national banks on the one side, and the State on the other, by which the taxation on these banks might be increased, and, at the same time, placing all the banks accepting its terms on the same footing. If no acceptance had been made there was no reason why the act could not have been enforced as against these corporations coming within the act of 1856, but neither the banks nor the State ever intended to perform such an idle act as entering into this solemn agreement that might be disregarded by the State whenever its representatives saw proper.

The rule is, if a statute is susceptible of two constructions, that which is consistent with public policy will be followed, and no meaning given a statute that will lead to an absurdity.

81 The case before us is much stronger for the banks than that of New Jersey *v.* Yard. Here, the old banks had contract rights sustained by the adjudication of the courts of the State, to the effect that they were not liable to local taxation, and the same adjudication followed in reference to national banks. The contract was not only executed, but based on a valuable consideration. If there were any doubt as to its meaning, that doubt would be construed for the State; but when considering the entire article, the intention of the legislature, it seems to us, is manifest. This increased tax, under the former constitution, as before stated, went to the State, and not to the municipalities. Such was the policy of the State when the contract was made, and we perceive no reason for abrogating its terms, so as to withdraw from the State treasury this additional tax the banks have been paying amounting to $125,000 annually, and transfer it to the cities to aid in discharging local burdens.

It requires no judicial utterance to show that, under the national banking act, where the rate of interest is fixed at six per cent. (or as the State law provides), and forfeiture of the entire interest if more is charged, that these banks by the imposition of local burdens, can not be taxed as much as two and one-half per cent. in any locality, when the average taxation of State banks will not exceed half that sum.

In the case of Lionberger *v.* Rouse, reported in 9 Wall., 468, after the national banking system went into effect, the legislature of Missouri passed a law authorizing the banks of issue in that State, ten in number, to enter into the new system. Eight of those banks became national banks, and two of them declined to do so.

82 The two old banks, as the Supreme Court of the United States held in that case, had a contract right with the State not to be taxed exceeding one per cent., and the State was powerless to increase this tax. The assessment of the plaintiff's shares of stock in the national bank was at the rate of nearly two per cent. It was

contended that this was an unjust discrimination in favor of the two State banks, and the Supreme Court said, as the national bank, or its shares, was not taxed for a greater sum than other moneyed institutions of the State, and the State was powerless to change its contract with the two remaining banks of issue, it was not such a discrimination as would authorize the court to interfere.

While there are exceeding sixty State banks, the Bank of Kentucky and its branches, the Northern bank and its branches, the Bank of Louisville, and the Farmers' Bank of Kentucky and its branches were, at the time of the passage of the Hewitt bill, and are now, regarded as the prominent banking institutions of the State, and if, with their capital and business rank placed before the Supreme Court with a tax of only one per cent. and the tax on the national banks placed at two per cent., the judgment of the Supreme Court upon such a state of fact, doubtless, would have been similar to the decision of the court in the case of The National Bank *v.* The City of Paducah, 10 Ky. L. R. 221.

The case of Lionberger *v.* Rouse, 9 Wall. 468 has no bearing on this question of contract. Here the State was not powerless to remedy the evil, or prevent the discrimination complained of in the Missouri case. The legislature devised a mode by which this discrimination could be removed, however, great, or even insig-
83 nificant, the difference in taxation might have been. The national banks recognizing the fact they could be taxed as other moneyed capital, and desiring uniformity of taxation, and not one rate for one bank, and a different rate for another, surrendered their right, or claim, to be taxed as the old banks were taxed, and entered into this agreement by which a uniform system of taxation was adopted for all banks, such as the State desired.

The claim of the old banks and the national banks, as to the mode of taxing them, was, certainly, not without foundation, for the reasons already given, and the proposition by the legislature to settle these differences, and its acceptance, was a wise and just solution of the whole question.

The case presented by this legislative repeal is the opposite of the legislation in the Missouri bank cases. In the one case there was no legislation making the discrimination, while in the case before us, the State, after placing the banks, State and national, on the same footing as to taxation, by the consent and agreement of all the parties to the contract, is now insisting upon a legislative re-cission of the contract, and placing the old banks at least in a position where they are to pay only fifty cents on the shares of a hundred dollars, and leaving the national banks subject to a greater rate of taxation.

This repeal, if sustained, is in effect, the creation of three or more new banks with a rate of taxation much less than that imposed on the national banks, and making a discrimination in favor of the old banks and their branches that gives them a monopoly of the banking business of the State.

The old banks, with a capital of five millions, at the time the
84 Hewitt bill passed, will be relegated to the condition they were — when the contract was made, as was held by the Supreme Court in the case of The Water Company *v.* Clark, reported in 143 U. S. 1, and that *an exemption* from local burdens, with a tax of one-half of one per cent. to the State. The national banks, with a capital of ten millions when the Hewitt bill was enacted, and now increased to twenty millions will also be exempt from local burdens, because the State, in the exercise of the power it now claims, had abandoned the contract under which taxation was equal and uniform, and voluntarily made an unjust discrimination, when in its power to prevent it. Such consequences would be disastrous to both the State and the municipalities, the State losing the increased tax, and the municipalities (or the legislature for them) without power to impose on national banks local burdens.

The banks have all, practically, accepted the provisions of the Hewitt law, and the legislation repealing or cancelling the contract, being in violation of both the State and Federal Constitutions, leaves the Hewitt bill, as to the banks, in full force, and they must be taxed under its provisions, until the contract terminates.

These moneyed institutions are now paying, including tax on surplus and reality, eighty cents, or about that sum, on each share of stock of one hundred dollars, while the citizen tax-payer is paying only forty-two and one-half cents, and at last it is a question whether this difference in the taxation is to be paid by the banks into the State treasury, as under the old constitution, or to the municipalities, under the new constitution.

In the absence of this contract it would go to discharge
85 local burdens, but with this contract in full force, it must be paid, as to the amount and manner, as provided by the Hewitt bill of 1886, into the treasury of the State.

It results, therefore, that the judgments in the case of The Louisville Banking Co. *v.* City of Louisville, Third National Bank *v.* City of Louisville, Northern Bank of Kentucky *v.* Bourbon County, Deposit Bank *v.* Franklin County, Bank of Kentucky *v.* Armstrong, Bank of Kentucky *v.* City of Frankfort, Farmers Bank *v.* City of Frankfort, Same *v.* Franklin County, and Same *v.* City of Henderson are reversed; and The City of Louisville *v.* Bank of Kentucky, Commonwealth *v.* State National Bank, Same *v.* Frankfort National Bank, Same *v.* Deposit Bank, Same *v.* Bank of Kentucky, City of Covington *v.* German National Bank, Same *v.* First National Bank, and Commonwealth *v.* Farmers Bank are each and all affirmed.

COMMONWEALTH OF KENTUCKY:

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, certify that the foregoing twenty five pages and this page, contain true and complete copies of all the orders and judgment and the opinion of said court of appeals in the case of City of Covington,

appellant, against First National Bank of Covington, appellee, lately pending in said court, as the same appears of record in my office.

Witness my hand and seal this 31st day of July, 1900.

SAMUEL J. SHACKELFORD, *Clerk*,
[SEAL.] By ROBERT L. GREEN, *D. C.*

86 And, on the same day, to-wit, on August 14", A. D. 1900 defendant's plea was filed herein which was and is in words and figures following, to-wit:

(*Defendant's Plea.*)

United States Circuit Court, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY,
v.
THE CITY OF COVINGTON, KENTUCKY, &C. } In Equity.

The joint and several plea of The City of Covington and John N. Middendorf, assessor of said city, to the bill of complaint of the First National Bank of Covington, Kentucky.

These defendants (by protestation, not confessing any of the matters in said bill contained to be true in manner and form as the same are therein set forth, do plead thereunto; and) for cause of plea say, that heretofore, to-wit, on the day said complainant exhibited its present bill of complaint in this honorable court and before and continuously since then it was and is a resident of the district of Kentucky, and that both defendants to said bill are and were residents of said district,

Wherefore, defendants say this court has not jurisdiction of this cause of action, nor of them, the defendants.

F. J. HANLON,
87 HARVEY MYERS,
Solicitors for Defendants.

W. H. JULIAN, *Counsel.*

Defendant's Demurrer.

United States Circuit Court, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, Complainant,
v.
THE CITY OF COVINGTON, KENTUCKY, &c., Defendants. } In Equity.

The joint and several demurrer of The City of Covington, Kentucky, and John N. Middendorf, assessor of said city, defendants, to the bill of complaint of the First National Bank of Covington, Kentucky.

These defendants say they are advised that there is good cause of demurrer to said bill; and they do demur accordingly and for cause of demurrer say that said bill contains no matter of equity whereon this court can ground any decree, or give complainant any relief as against these defendants.

Wherefore, these defendants do demur thereto, and crave judgment of the court, whether they shall make answer to said bill otherwise than as aforesaid.

And they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

88

W. H. JULIAN,
F. J. HANLON,
HARVEY MYERS,
Solicitors for Defendants.

I hereby certify, as counsel for defendants in the foregoing demurrer that, in my opinion, the same is well founded in point of law, and proper to be filed.

F. J. HANLON.

The defendant, John N. Middendorf, makes oath that the foregoing demurrer is not interposed for delay of the cause in which it is filed.

JOHN N. MIDDENDORF.

Subscribed and sworn to before me by said John N. Middendorf, this 30th day of July, 1900.

J. M. MAHON,
Notary Public, Kenton Co., Ky.

My commission expires March 4", 1902.

And on the same day, to-wit, on August 14th, an opinion was filed herein which was and is in words and figures following, to-wit:

Opinion.

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON
v.
CITY OF COVINGTON ET AL.

The complainant brings this action to enjoin the City of
89 Covington and its officers from assessing and collecting for municipal purposes the taxation on its shares of capital stock, provided for in the act of the General Assembly of Kentucky approved March 21st, 1900, entitled "An act relating to the taxation of shares of stock of national banks" which is as follows:

"Whereas the Supreme Court of the United States has lately decided that article three, chapter one hundred and three (103) of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three, is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said articles in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore, be it enacted by the General Assembly of the Commonwealth of Kentucky:—

SECTION 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

SEC. 2. For the purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the banks to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

90 SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies: Provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and nine-two, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this

act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

SEC. 5. The assessment of said shares of stock and collection of taxes thereon, as contemplated by this act may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after
91 its *its* passage."

To clearly understand the scope of this very important controversy it is necessary to say that in 1886, in an effort to remedy the confusion growing out of certain unrepealable provisions in the charters of the older banks in regard to taxes, the legislature passed what is commonly called the Hewitt act, the pertinent provisions of which are as follows:—

"SECTION 1. The shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75 cents on each share thereof, equal to $100., or on each $100 of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall, in addition, pay upon each $100 of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10 per cent. of their capital stock, which shall be in full of all tax, State, county and municipal.

* * * * * * *

SECTION 4. That each of said banks, institutions and corporations by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its
92 shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such banks."

This rate of taxation, all the avails of which went to the State, was higher than that paid by other property, but on that account the banks were exempt from local taxation. In 1892 the legislature enacted what is now section 4077 of the Kentucky Statutes, as follows:

"SECTION 4077. Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, telegraph company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchises, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman
93 of said board, and shall convene the same from time to time as the business of the board may require."

Section 4078 prescribed the manner of ascertaining the value of the franchises to be assessed. As a basis for this assessment banks, under section 4092, were required to make reports, on the first day of March of each year, of their condition the preceding 31st day of December, and to pay the tax on July 1st following. This subsequent legislation was intended to repeal and in express terms did repeal the Hewitt law. After the enactment of the legislation last referred to, the complainant, in November 1893 instituted an action in the State court to enjoin the levy for that year as against it of the taxation thereby provided for, and in its petition averred that long before the enactment of this legislation it had accepted the provisions of the Hewitt act within the time named therein; that it had up to that date paid the taxes provided for by the terms of the Hewitt act as accepted by complainant, and in due form sought the judgment of the State court upon its claim that the Hewitt act and its acceptance thereof constituted an irrevocable contract between the complainant and the State of Kentucky which the legi-lation of 1892 would impair. The court in which the action was brought, in 1894, distinctly adjudged that this contention was well founded, and that the provisions of the Hewitt act and their acceptance by the

complainant did constitute an irrevocable contract between the State and this bank, and further, that the legislation of 1892 was void as to the complainant as impairing that contract. This decision of the court of appeals of Kentucky, affirming that judgment being in favor of the right claimed under the Constitution of the United States could not be appealed to the Supreme Court of the United States.

The bill of complaint, as amended, in the case before us, insists not only that the question of taxation between the complainant and the State of Kentucky, including the municipality of Coving-
94 ton up to 1904, is conclusively settled and adjudged by the court of appeals upon the basis referred to, but that the act of March 21 1900, is also unconstitutional, first, in its attempt by section 3 to authorize the levy of taxation upon the complainant for the years previous to March 21, 1900, and also, second, because the taxation provided for by the said act discriminates against national banks, and levies upon the shares of national banks a greater rate of taxation than is levied upon other moneyed capital, and particularly upon capital invested in State banks and denies them the equal protection of the law.

As clearly established by many decisions, and particularly by that announced in the case of Owensboro National Bank *vs.* Owensboro, 173 U. S. 664, all State laws providing for the taxation of shares of national banks must be subject to the provisions of section 5219 of the Revised Statutes of the United States, which is in this language:

"SECTION 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The Supreme Court, in the case last referred to, held that
95 section 4077 of the Kentucky statutes, so far as it affects national banks, is void, because it is in conflict with that section. The Hewitt law having been repealed in 1892, and section 4077 of the Kentucky statutes being void as to national banks, there was no State statute in force for taxing the shares of the latter for municipal purposes until the act of March 21st, 1900, was passed. The third section of that act is now assailed upon the ground that it undertakes to tax those shares retroactively and illegally.

The court will not attempt to decide that there may not, in extreme cases, be a legitimate statutory enactment imposing a retro-

active taxation for previous years upon a class of property not then subject to taxation at all. But it would at least be a rare case, and one which would come extremely near to taking property for public use without just compensation, and might be most dangerous and oppressive, as well as destructive of many other established principles of the law of taxation. If the power to do this exist at all there is no limit to it, and it might illustrate the subject to consider the result if church property now exempt should, as it lawfully might, be made subject to taxation in the future, and not only be, but retroactively for ten, or twenty, or even fifty years back. Here would be a practical confiscation of such property for public use. Nor does the court mean to deny that where the law in fact imposes taxation upon property, which, however, is overlooked by the assessor, or otherwise omitted from the assessment, or some other step is taken which is faulty, the defects may not be cured by legislation. That curative legislation is admissible in such cases is a well established doctrine of the courts, but there was no legislation—valid legislation—for taxing national bank shares as such before March
96 21, 1900, and the act of that date was not passed to validate defective steps taken to levy a lawful tax, but it is legislation which imposes an altogether new tax upon a new subject. Any attempt to give it the appearance of being a curative statute is merely nominal and colorable, and cannot be effective. The previous legislation had been void because it was opposed to section 5219, Revised Statutes, and could not be cured, though other new and different legislation might be enacted. Moreover, it imposes a tax upon national bank shares alone, and the retroactive feature of section 3 is a manifest discrimination against national bank shares, as there is no corresponding provision in any law of the State for the retroactive taxation of moneyed capital in the hands of State banks or of individuals. Other banks paid, and now pay, only a franchise tax for municipal purposes. National banks must, according to the act, pay, not a tax equivalent to the franchise tax imposed upon State banks, but a tax the rate of which is the same as that upon "real estate," which rate might not comply with section 5219 of the Revised Statutes, unless it is the same as that put upon other "moneyed capital," as that phrase has been construed by the Supreme Court. It is manifestly very improbable that the rate of taxation on real estate can be equivalent to the rate imposed by the franchise tax. At all events, for the reasons indicated, it seems to the court to be very clear that section 3 of the act conflicts with the requirements of section 5219, because there is nowhere any corresponding retroactive imposition on State bank shares, and the rate of taxation on real estate can hardly be the equivalent of the rate of taxation imposed on State banks by the franchise tax. And, besides, as the bill shows, the State has collected and received from the complainant in this case the high taxes imposed under the Hewitt law up to the
97 current year. There is no way to sue the State of Kentucky in her courts to compel it to refund the tax thus paid. Nor is there any way to compel the State to make an adjustment of such

payments in the collection of the taxes under section 3 of the act of 1900, although it is therein vaguely provided that credit shall be given, but our laws afford no way authoritatively to make the provision effective. No officer is charged with the duty or given the power to make it so. Until the State in this case refunded the taxes wrongfully collected (if it should so turn out) under the Hewitt act, or shall provide some adequate way for doing *do*, it must be content with the taxation levied in the way provided by its own legislation, at least so long as it retains the money. Otherwise there would be a double taxation. Certainly the State must not, in attempts to correct its legislation upon the subject of taxation, discriminate against national bank shares in such a way as to violate section 5219. So long as the State retains the taxes collected under the Hewitt law from this national bank it is a manifest discrimination against it to again retroactively tax its shares for the same years without taxing also in the same way the State banks. We may sum up this phase of the case by saying that it may, in the abstract, be legally possible to pass a valid retroactive tax law, yet in the concrete case before us it was not done, the attempted legislation for the reasons indicated being in conflict with section 5219.

As the present holders of the complainant's shares may be very different persons from those who held them in previous years; as the present holders may have purchased under the previously existing law, and as their rights and interest would be injurious- affected by large payments for retroactive taxation, at least one phase of what has been said is well supported by the reasoning of the
98 opinion of the court of appeals in Bellevue *v.* Peacock, 89 Ky. 495. When the town of Bellevue made a contract with certain persons to improve a street, it was supposed by all parties that the law empowered the town to impose the cost upon the abutting property, and the contract so required. The court of appeals however, decided that the town had no such power. Subsequently the legislature passed an act attempting to validate the contract and to impose the necessary taxation retrospectively upon the property. In a suit to test the question the court in the opinion referred to held the act unconstitutional largely upon the ground that as there was no law to so burden the property at the time the improvements were made, the legislature could not subsequently impose it. The complainant and its shareholders in the case before us stand in substantially the same position as did the owners of the abutting property in the Bellevue case in respect to previous judicial decisions and otherwise. There was no law until the act of 1900 imposing any such liability as it attempted to create, and at least unless a similar burden is imposed upon other moneyed capital the retroactive liability cannot be imposed upon national banks.

Coming now to the question of whether the whole act of March 1900, is void as being in conflict with section 5219 of the Revised Statutes, it must be borne in mind that this may be manifested in either of two forms, first, it may appear on the face of the State law itself, as in the statute of 1892, pronounced invalid by the Supreme

Court in the case of Owensboro National Bank *vs.* Owensboro, 173 U. S., or, second, it may come in the manner of enforcing the State law, or in the manner of operating under it, as in cases like People *vs.* Weaver, 100, U. S. 539, and Whitbeck *vs.* Mercantile National Bank, 127, U. S. 193.

It goes without saying that money invested in national bank shares should bear its ratable proportion of the public bur-
99 dens. Nothing in the legislation of Congress, nor in the decisions of the courts of the United States, in the slightest degree prevents this. All that is done is, under section 5219, to guard money so invested against any form of State taxation which puts it at a disadvantage as compared with money invested in State banks. The wisdom and necessity of this rule is obvious. The professed object of the act of 1900 is to make the taxation upon all banks equal. The operations of the act may possible in the future bring about such a result, though upon the fact of the statute it appears well nigh impossible. *Prima facie* a discrimination exists, the one being taxed on an entirely different basis or plan from the other. The State banks pay taxes upon a valuation of their franchises &c. and national banks upon the valuation of their shares in the hands of individual holders. By no intelligent system of valuation does it appear possible to value a franchise annually as high as all the property of the corporation as appears to be necessary in order to make the two modes of taxation agree. These cannot be equivalnet in law, and *prima facie* they appear not to be equivalent in fact, though possible this latter appearance may be overcome by proof. The City of Covington would, therefore, appear to be entitled to have an opportunity, if so desiring, to plead and prove that the result of the operation of the act of 1900 will not in fact discriminate in the next fiscal year against money invested in national bank shares, and after this opportunity is afforded the court can determine upon the evidence whether the actual results under the act conflict with section 5219, by imposing a greater rate of taxation upon money invested in national bank shares than upon that invested in State bank shares should there by any moneyed capital in said city so invested as to bring it within the rules adopted by the Supreme Court in construing section 5219.

In this particular case, however, the views so far expressed
100 may all become subordinate to the question most energetically urged that, as to the complainant, the act of 1900 can have no operation before 1904, because up to that time it has an irrevocable contract with the State to the effect that its shares shall only be taxed according to the proviosions of the Hewirr lawm and that this matter has been finally adjudicated by the courts of the State in the manner stated in the bill.

The general doctrine as to the conclusive effect of judgments upon matters in controversy between the same parties, or those in privity with them, is certainly broad enough, as usually stated, to cover cases like this, if there are no exceptions to it. The case of New Orleans *vs.* Citizens' Bank, 167, U. S. 371, goes far towards closing

the question, and will do so unless its operation should be limited by considerations now to be stated. Of course as to the claim for taxes for the year named in the suit described in the bill of complaint, the judgment is absolutely conclusive, although in the light of later decisions palpably erroneous. Should its effect be limited to the taxes for the year named in that suit under the circumstances about to be stated is an extremely interesting question. The judgment relied upon in the bill was certainly based upon the opinion that the Hewitt law and the complainant's acceptance of its provisions constituted an irrevocable agreement between the bank and the State of Kentucky that the former should not be taxed otherwise than pursuant to the Hewitt law for any purpose, but in terms it only embraced the taxes for the year 1893, and only enjoined their collection. If did not in its language or scope embrance any others. It, however, as stated, went upon the general doctrine that there was a contract thus created between those parties which the Federal Constitution protected from any impairment. Bank Tax cases 97 Ky. 591. Within a year of so after this judgment was rendered, and from which no appeal could be taken to the Supreme Court of the United States for the reason al-
101 ready indicated, the court of appeals overruled the doctrine which it had therein announced, and expressly held that there was no contract growing out of the facts adjudicated in the previous litigation 39 S. W. Rep. 1030. It was then also held that legislation as to the manner of imposing taxation could not be made the basis of a contract, but was a matter entirely under the control of the State, and might be altered at its pleasure. In the case of The Citizen's Saving Bank, etc., *vs.* Owensboro, 173 U. S., 636, the Supreme Court sustained in the fullest manner the last view taken of the question by the court of appeals of Kentucky. So that we have here a claim to the benefit of the doctrine of *res adjudicata* as against the clearest decision that the judgment relied on was based upon a proposition, not of fact, but of constitutional law which has been utterly repudiated not only by the highest judicial tribunal in Kentucky which had announced it, but also by the Supreme Court of the United States itself. I have not found any decision upon the exact point, but I am greatly oppressed by the thought that common justice may demand such a relaxation of the general rule as to matters adjudicated as to limit its operation within very wide bounds, it is true, but still to such as will exclude a case precisely like this, so far at least as it affects taxation subsequent to the announcement of the final settlement of the constitutional doctrine. Otherwise much injustice and inequality cannot be avoided. It is possible that it was with a purpose and desire to consider this phase of the question when it should come up that the Supreme Court, in the Owensboro case, 173 U. S., at page 648, so explicitly withheld an expression of its opinion as to whether the principle of *res adjudicata* would apply to suits for taxes claimed as is here pleaded.

It may be that the authorities, which are very strong, will not

permit even such an exception to be grafted upon the general
102 rule, and it may also be that I shall ultimately conclude that in any event it will be becoming, in view of the opinion in the case of New Orleans *vs.* Citizens' Bank, 167 U. S., for this court to leave it to a higher tribunal to say whether there should be any limitat-ons upon the general rule as to the conclusive effect of judgments as between the parties to the litigation. But, as the decision of the motion for a temporary injunction does not absolutely require a final expression on the question, I shall leave it open for further consideration.

It has been suggested that before any injunction is granted, the complainant in such a case should pay the amount of taxes which is fairly due from it. This is a principle certainly in force where a valid law leaves no doubt that something is due. But if the claim of *res adjudicata* made by the complainant is maintainable, such payment in this case has already been made. And even if the principle could apply here at all, where the entire tax is contested, it can hardly be enforced until a final judgment has determined whether there is anything at all due from the complainant, and besides, there appears to be manifest equity in the bill so far as it seeks to enjoin the enforcement of section 3 of the act.

It is also insisted that for the case made by the bill there is an adequate remedy at law. The case of The Bank of Kentucky *vs.* Stone 88 Fed. Rep 383, is a sufficient authority to the contrary although that case was affirmed by a divided court (174 U. S. 799) And besides the relief sought as to section 3 of the act appears to be decisive of this question. It also seems to be settled upon the authority of Hills *vs.* Exchange Bank, 105 U. S. 319, and the cases there cited that the bank itself may sue in cases like this to protect the interest of its shareholders.

103 It follows that the complainant is entitled to an injunction *pendente lite* restraining the defendants and each of them, until the further order of the court, from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and also, until the further order of the court, restraining the defendants and each of them from collecting either from the complainant or from any of the holders of shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a rate higher than is permitted by section 5219, Revised Statutes, and if so, to what extent.

Counsel will prepare the proper orders.

WALTER EVANS, *Judge.*

August 14, 1900.

And on the same day, to-wit: on August 14th A. D. 1903, a temporary injunction was issued herein, which was and is in words and figures following, to-wit:—

104 *Temporary Injunction.*

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK, Complainant,
v.
CITY OF COVINGTON ET AL., Defendants. } Order.

This day came complainant by J. W. Bryan, its counsel, and with leave of the court filed its amended bill of complaint herein, with an exhibit therewith attached, and moved the court for a temporary injunction restraining the defendants from assessing or collecting any taxes for municipal purposes from complainant or any of its shareholders until the further order of the court. Pending said motion, the defendants came by F. J. Hanlon, W. H. Julian and Harvey Myers, their counsel, and with leave of the court tendered and filed a plea to the jurisdiction of the court of this action, and with like leave of the court were also permitted now to file a demurrer to the bill of complaint as amended, but neither said plea nor said demurrer was set down for argument. And the said motion of the complainant for the temporary injunction aforesaid coming on to be heard, was argued by counsel, and the court being sufficiently advised delivered an opinion in writing, which is ordered to be filed and pursuant thereto it is ordered, adjudged and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of com-
105 plainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent. Service of this order shall be made upon the defendants by delivery to each of them of a copy thereof.

August 14, 1900 WALTER EVANS, *Judge.*

Return.

Said temporary injunction was returned endorsed in words and figures following, to-wit:—

"I hereby certify that I received the within writ on the 15th day of August, 1900 and that I personally served the same this 15th day of August, 1900, upon the said defendants, The City of Covington by delivering to W. A. Johnson, its mayor, a true copy of this writ and John H. Middendorf, assessor for the city of Covington by delivering to him a true — of the within writ. This, therefore returned executed as the law directs this 15th day of August, 1900.

A. D. JAMES,
U. S. Marshal,
By J. D. COMPTON, *D. M.*

106 And on a day following, to-wit, on December 17th, A. D. 1900 a motion was filed herein which was and is in words and figures following, to-wit:

Motion.

United States Circuit Court, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
v.
THE CITY OF COVINGTON ET AL.

The complainant, The First National Bank of Covington, Ky., by J. W. Bryan, its counsel, moves that the injunction granted *pendente lite* herein be made permanent.

FIRST NATIONAL BANK OF COVINGTON, KY.,
By J. W. BRYAN, *Its Counsel.*

And, on the same day, to wit, on December 17th A. D. 1900 stipulation was filed herein which was and is in words and figures following, to-wit:

Stipulation.

United States Circuit Court, District of Kentucky, at Covington.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

107 It is hereby stipulated and agreed by and between the parties to this cause that they do now waive alike the setting

down for argument of the defendants' plea to the jurisdiction of the court and of their demurrer to the bill of complaint. It is also stipulated and agreed that if the court shall not sustain the said plea, and if it shall disallow and overrule the said demurrer, then that in that event the bill shall be taken for confessed, the defendants now saying that they do not desire to answer the said bill or further plead thereto, and that without waiting the thirty days required by the rules after a judgment *pro confesso* the cause may be sustained for final judgment, and the matter thereof and all pending motions be adjudged by the court.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
By J. W. BRYAN, *Its Counsel.*
F. J. HANLON,
Solicitor for Defendant, City of Covington.
HARVEY MYERS,
Counsel for Defendant.

108 And, on the same day, to-wit, on December 17th A. D. 1903 *en* entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 45.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

The parties came by their counsel, and the complainant in writing now filed, moved the court that the injunction granted *pendente lite* herein be made permanent and thereupon the parties filed a stipulation in writing, and pursuant thereto, this cause is now submitted for the judgment of the court upon said motion and also upon the plea of the defendants to the jurisdiction of the court and also upon their demurrer to the bill of complaint and if the said plea and said demurrer are both disallowed and over-ruled then the cause is submitted for the judgment of the court as upon a final hearing, the bill, by said agreement, being then to be taken for confessed and further delay thereon being waived by the consent of the parties.

And on the same day, to-wit, on December 17th A. D. 1900 judgment was entered herein which was and is in words and figures following, to-wit:—

Order Book "I," page 45.

109 THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

This cause came on to be further heard at this term, and was argued by counsel, and thereupon upon consideration thereof, and of the stipulation filed herein, it is ordered, adjudged and decreed as follows, namely:—

First. That the plea of the defendants to the jurisdiction of the court be and the same is disallowed and over-ruled.

Second. That the bill of complaint "as amended and to which the demurrer and plea were considered as applying is sufficient and contains matter of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor, for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make
110 any collection of taxes so assessed until the court shall have determined upon further pleadings and evidence herein, should the defendants elect to resent the same whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

Fourth. And the court hereby retains contract of this cause for the purpose of adjudicating and settling any questions which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant.

Fifth. It is further ordered, adjudged and decreed that the complainant recover of the defendants its costs herein expended to be taxed by the clerk.

The complainant and defendants alike separately and each for himself excepts to the foregoing judgment.

And, on a day following, to-wit, on December 19, 1900 restraining order was issued herein which was and is in words and figures following, to-wit:

Restraining Order.

United States Circuit Court, District of Kentucky, at Covington.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

This cause came on to be further heard at this term, and
111 was argued by counsel, and thereupon upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged a-d decreed as follows, namely:

First. That the plea of the defendants to the jurisdiction of the court be and the same is disallowed and overruled.

Second. Tha- the bill of complaint is sufficient and contains matters of equity meet to be considered by the court and the demurrer thereto is also disallowed and overruled.

Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined upon further pleadings and evidence herein, should the defendants elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise
upon any assessment made upon any of the shares of the
112 capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant.

Fifth. It is further ordered, adjudged and decreed that the complainant recover of the defendants its costs herein espended, to be taxed by the clerk.

The complainant and the defendants alike, separately and each for himself, excepts to the foregoing judgment.

WALTER EVANS, *Judge.*

December 17, 1900.

UNITED STATES OF AMERICA, }
District of Kentucky. }

I, Jos. C. Finnell, clerk of the United States circuit court, for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an order made and entered in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at Covington, this 19th day of December, A. D. 1900.

[*Clerk.*] JOS. C. FINNELL, *Clerk.*

Return.

Said restraining order was returned endorsed in words and figures following, to-wit:—

I hereby certify that I received this writ on the 20th day of December 1900 and that I personally executed it by delivering to
W. A. Johnson, mayor of the city of Covington, a true copy
113 of the order, defendants, also to W. A. Johnson individual-, on the 20th day of December 1900 in Covington, Ky.

A. D. JAMES,
U. S. Marshal,
By J. D. COMPTON, *Deputy.*

And, on a day following, to-wit, on January 7th, A. D. 1901 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 61.

The defendants, The City of Covington and John N. Middendorf the assessor of the city of Covington, considering themselves aggrieved by the judgment herein, on the 17th day of December 1900, come now and present to the court their petition for an appeal to the Supreme Court of the United States, together with an assignment of errors, asserted and intended to be urged in that behalf.

On consideration whereof the court now orders that on a bond as provided by law, being filed, in the penal sum of $500.00 to the acceptance of the clerk, the said appeal be allowed and it is ordered that a transcript of the record, proceedings and papers, upon which the judgment of this court was rendered in this cause duly authenticated, be sent to the Supreme Court of the United States, according to law in such case provided.

114 And, on the same day, to-wit, on January 7th A. D. 1901 petition for appeal was filed herein which was and is in words and figures following, to-wit:—

Petition for Appeal.

United States Circuit Court, District of Kentucky, at Covington, December Term, Monday, December 17th, 1900.

FIRST NATIONAL BANK, Complainant,
vs.
THE CITY OF COVINGTON & JOHN N. MIDDENDORF, the Assessor of the City of Covington, Defendants.

Before the Honorable Walter Evans, judge.

To the Honorable Judge Evans:

The above-named defendant-, City of Covington and John N. Middendorf, the assessor of the city of Covington conceiving themselves aggrieved by the order and decree made and entered in the above entitled cause on December 17, 1900, wherein and whereby it was ordered adjudged and decreed "that the said defendants and each of them, be enjoined and restrained from assessing for taxation any of the shares of stock in the complainant bank, either against complainant or any holder of its shares, or making any levy of
115 taxes upon any of said shares for any purpose, for any time or period, previous to March 21, 1900, and from collecting from complainant or any of its shareholders any taxes upon any of said shares of stock for any time subsequent to that date" said decree being final—to which decree the said defendants and complainant, and each of them, excepted at the time of the rendition thereof. The said defendant- City of Covington and John N. Middendorf, city assessor of the city of Covington, by their attorney now come and do hereby appeal from said order and decree of December 17, 1900, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herein, and they and each of said defendants pray that this appeal may be allowed, and they pray for an order fixing the amount of the supercedeas bond which defendants shall give and furnish upon said appeal, and that a transcript of the record, papers, and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States, to the end that said decree may be reversed and that said errors may be corrected, and so they will ever pray.

F. J. HANLON,
City Solicitor for the City of Covington.

HARVEY MYERS,
W. H. JULIAN,
Of Counsel.

And, on a day following, to-wit, on January 19th A. D. 1901, assignment of errors was filed herein which was and is in words and figures following, to-wit:—

116 United States Circuit Court, District of Kentucky, at Covington, December Term, Monday, December 17, 1900.

FIRST NATIONAL BANK, Complainant,
vs.
THE CITY OF COVINGTON & JOHN N. MIDDENDORF, the Assessor of the City of Covington, Respondents.

Before the Honorable Walter Evans, judge.

Assignment of Errors.

To the Honorable Judge Evans:

Comes now the defendants and each of them, and file the following assignment of errors upon which they and each of them will rely.

First. The court erred in overruling the defendants' plea to the jurisdiction of the court.

Second. The court erred in holding the bill of complaint as amended to which the plea and demurrer were considered as applying, sufficient and in overruling the demurrer of the defendants thereto.

117 Third. The court erred in enjoining and restraining the defendants and each of them from assessing the shares of stock in complainant bank, and from levying taxes thereon for any purpose, for any time, or period previous to March 21, 1900, and erred in enjoining and restraining the collection of any taxes either from the complainant bank or from any of the holders of the shares of the capital stock of said bank for any time, subsequent to that date.

Fourth. The court erred in retaining control of this cause for any purpose.

Fifth. The court — in decreeing costs herein, against defendant.

Sixth. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint.

In order that the foregoing assignment of errors may appear of record, the respondents and each of them, present the same to the court and pray that such disposition be made thereof, as in accordance with law, and the statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

F. J. HANLON,
City Solicitor for the City of Covington.

HARVEY MYERS,
W. H. JULIAN,
Of Counsel.

And, on a day following, to-wit, on January 18", A. D. 1901 bond on appeal was filed herein which was and is in words and figures following, to-wit:—

118 Circuit Court of the United States, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, Kentucky,
vs.
THE CITY OF COVINGTON and JOHN N. MIDDENDORF, *Assessor of the City of Covington.*
} Bond on Appeal.

Know all men by these presents that we The City of Covington and The American Bonding and Trust Company of Baltimore City are held and firmly bound unto The First National Bank of the City of Covington in the sum of five hundred dollars, to be paid to the said The First National Bank of the City of Covington Kentucky, executors or administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this 17th day of January A. D. 1901

Whereas, the above named The City of Covington, Ky., and John N. Middendorf, assessor of said city of Covington, Ky., have prosecuted and appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the circuit court of the United States for the district of Kentucky, at Covington.

Now, therefore, the condition of this obligation is such that if the above named The City of Covington, Ky., and John N. Middendorf, assessor of the said city of Covington, Ky., shall prosecute this said appeal to effect and answer all costs, if they shall fail to
119 make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE AMERICAN BONDING COMPANY
OF BALTIMORE CITY,
[SEAL.] By BEN A. ADAMS, *Vice Pres.*
Attest: L. J. DROEGE, *Ass'nt S'c'y.*
THE CITY OF COVINGTON,
By W. A. JOHNSON, *Mayor.*

Sealed and delivered in the presence of
JOS. C. FINNELL, *Clerk.*

Approved January 18" A. D. 1901,

JOS. C. FINNELL,
Clerk U. S. Circuit Court, Kentucky Dist.

And, on a day following, to-wit, on June 3rd., A. *F.* 1902 motion to file mandate was filed herein which was and is in words and figures following, to-wit:—

Motion to File Mandate and Opinion and to Redocket.

FIRST NATIONAL BANK OF COVINGTON, a Corporation,
vs.
CITY OF COVINGTON, a Municipal Corporation, and JOHN N. MIDDENDORF, Assessor of the City of Covington.

Now comes the respondents herein, City of Covington, and John N. Middendorf, assessor of the city of Covington and move the
120 court for leave to file the mandate and opinion of the Supreme Court of the United States, of date, April 28th, 1902, and to re-docket this cause.

F. J. HANLON,
W. H. JULIAN,
Counsel for Respondents.

And, on a day following, to-wit, on June 3rd, A. D. 1902 motion to modify injunction was filed herein which was and is in words and figures following, to-wit:

United States Circuit Court.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, a Corporation,
vs.
CITY OF COVINGTON, a Municipal Corporation, and JOHN N. Middendorf, Assessor of the City of Covington. } In Equity.

Now comes the respondents herein, The City of Covington, and John N. Middendorf, assessor of the city of Covington, and move the court to modify the injunction granted herein, in so far as it restrains and enjoins the defendants and each of them, from making any assessment of the shares of stock of complainant bank, for any time or period previous to March 21st, 1900.

F. J. HANLON,
W. H. JULIAN,
Counsel for Respondents.

And on the same day, to-wit, on June 3rd, A. D. 1902 an
121 entry was made herein which was and is in words and figures following, to wit:—

Order Book "I," page 474.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY,
vs.
CITY OF COVINGTON.

Upon motion of F. J. Hanlon, counsel for respondents, it is ordered that the mandate and opinion of the Supreme Court of the United States be filed and the mandate spread upon the minutes of this court, and it appearing from said mandate and opinion that the appeal to the Supreme Court of the United States was dismissed for want of jurisdiction, and it appearing further that said case was remanded to the circuit court of the United States for the eastern district of Kentucky it is further ordered upon motion of said F. J. Hanlon, counsel for respondents, that the said case now stands redocketed in this court, said mandate is as follows:

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable judges of the circuit court of the United States for the eastern district of Kentucky, Greeting:

Whereas, lately in the circuit court of the United States for the district of Kentucky in a case between The First National Bank of Covington, Kentucky, complainant, and The City of Covington and John N. Middendorf, assessor of the city of Covington, defendants, wherein the decree of the said circuit court, entered in said
122 cause on the 17th day of December, A. D. 1900 was in favor of the said complainant, The First National Bank of Covington, Kentucky, and against the said defendants, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeable to the act of Congress, in such a case made and provided fully and at large appears.

And, whereas, in the present term of October in the year of our Lord one thousand nine hundred and one the said cause came on to be heard before the said Supreme Court, on the said transcript of record and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that this appeal be, and the same is hereby dismissed for the want of jurisdiction. And it is further ordered that this cause be and the same is hereby remanded to the circuit court of the United States for the eastern district of Kentucky April 28th, 1902.

You, therefore, are hereby commanded that such proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 29th day of May in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

And, on the same day, to-wit, on June 3rd A. D. 1902 an opinion was filed herein which was and is in words and figures following, to-wit:

123 *Opinion.*

Supreme Court of the United States, October Term, 1901.

THE CITY OF COVINGTON, KENTUCKY, and John N. Middendorf, Assessor of the City of Covington, Appellants,
vs.
THE FIRST NATIONAL BANK OF COVINGTON, Kentucky.

No. 255. Appeal from the Circuit Court of the United States for the District of Kentucky.

(APRIL 28TH, 1902.)

On July 23rd, 1900, the appellee herein filed a bill seeking to enjoin the threatened assessment and collection by the defendants below (appellants here) of municipal taxes under the assumed authority of an act of the General Assembly of the State of Kentucky, approved March 21st, 1900, a copy of which is excerpted in the margin.*

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* "Whereas the Supreme Court of the United States has lately decided that article three, chapter one hundred and three of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article, in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore,

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"SECTION 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city or town and taxing district in which the bank is located.

"SECTION 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock

with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock."

"SECTION 3. When any of said shares of stock have not been listed for taxation for any of said purposes under
124 levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; provided, that when any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year of years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act,

"SECTION 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon."

"SECTION 5. The assessment of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessment of real estate and collection of taxes thereon may be enforced."

"SECTION 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three of the revenue law and said decision of the Supreme Court."

"SECTION 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, and emergency exists, and this act shall take effect and be in force from and after its passage."

In substance, it was averred in the original bill and in an amendment thereto that the complainant was chartered on November 17th, 1884, for a term of twenty years; that in 1886, by the acceptance of the provisions of an act of the General Assembly of Kentucky, approved May 17th, 1886, known as the Hewitt act, a contract was entered into with the State of Kentucky, irrevocable during the existence of the charter of the bank, whereby the complainant became obligated to pay the State taxes upon the shares of its stock, surplus

and undivided profits at a designated rate, such taxes to be in
125 full of all other taxes (State, county or municipal) except thos- levied upon its real property; that complainant had regularly made the payments stipulated in said contract up to and including the payment due July 1, 1900; that the taxes thus paid much exceeded the regular taxes imposed by the State during said period upon the real and personal property; and that the fact of the existence of an irrevocable contract had been conclusively determined by the judgment and decree of the court of appeals of Kentucky in a litigation between the banks and the State and the City of Covington, growing out of an attempt to collect State and city taxes upon the franchise of the bank, under the authority of an act of the General Assembly of Kentucky, approved November 11, 1892. It was also averred that notwithstanding the foregoing the General Assembly of Kentucky enacted the statute of March 21, 1900, already referred to, and that the defendants were attempting, under the assumed authority of said act, to compel complainant to list for taxation its shares of stock, and that the defendants designed and intended to assess said shares and to collect municipal taxes thereon for the benefit of the city of Covington for the years 1893 to 1900, both inclusive.

At much length facts were detailed in the bill and amendment regarding a reduction of the capital stock of the complainant made in July, 1897, as to the regular payments of dividends to stockholders during the years for which the tax was sought to be assessed and collected and as to changes in the ownership of the stock during said period. The unconstitutionality of the statute and the illegality of the threatened proceedings thereunder were asserted upon various grounds.

The defendants filed a plea to the jurisdiction and also demurred for want of equity. A motion for a temporary injunction was heard and granted, the court embodying its views in an elaborate opinion. (103 Fed. Rep. 523.) The order for the temporary injunc-
126 tion concluded as follows:

"It is ordered, adjudged and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the tax- so assessed are at a higher rate than is permitted by law and to what extent."

The complainant thereupon moved that the injunction be made permanent, and by stipulation the cause was submitted to the court "upon said motion, and also upon the plea of the defendants to the jurisdiction of the court, and also upon their demurrer to the bill of complaint," it being agreed that "if the said plea and said demurrer are both disallowed and over-ruled, then the cause is submitted for the judgment of the court as upon a final hearing, the bill then to be taken for confessed, and further delay thereon being waived."

On December 17, 1900, the following decree was entered:

"This cause came on to be further heard at this term and
127 was argued by counsel; and thereupon, upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged and decreed as follows, namely:

"First. That the plea of the defendants to the jurisdiction of the court be, and the same is, disallowed and overruled.

"Second. That the bill of complaint, as amended and to which the demurrer and plea were considered as applying, is sufficient and contains matters of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

"Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either the complainant or any holder of its shares any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting either from the complainant or from any of the holders of the shares of the capital stock, any taxes upon any of said shares, upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleading and evidence herein, should the defendants elect to present same, whether the taxes so assessed are at a higher
128 rate than is permitted by law, and to what extent.

"Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant."

An application for the allowance of an appeal was filed by the City of Covington and Middendorf; and an assignment of errors was

also filed on behalf of said defendants, the grounds, as stated therein, being reproduced in the margin.*

"Come now the defendants and each of them and file the following assignment of errors, upon which they and each of them will rely:—

"First. The court erred in overruling the defendant's plea to the jurisdiction of the court.

"Second. The court erred in holding the bill of complaint as amended, to which the plea and demurrer were considered as applying, sufficient and in overruling the demurrer of the defendant thereto."

"Third. The court erred in enjoining the defendants and each of them from assessing the shares of stock in complainant bank, and from levying taxes thereon for any purpose for any time or period previous to March 21, 1900, and erred in enjoining and restraining the collection of the shares of the capital stock of said bank, for any time subsequent to that date.

"Fourth. The court erred in retaining control of
129 this cause for any purpose.

"Fifth. The court erred in decreeing costs herein against defendant.

"Sixth. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint."

An order allowing the appeal as prayed was made. No appeal was prayed by the complainant.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the court.

It is apparent that the bill as amended sought by injunction to prevent the collection of taxes on the shares of stock of the bank for the year 1893 to 1900, both inclusive, and indeed it is obvious from the decree that the court considered the case also involved the question whether any other than the tax provided by the Hewitt act could be imposed upon the bank during the remainder of its corporate existence. The relief sought was based upon the following grounds:

1. There was a contract with the bank by which the taxes authorized by the act of 1900 could not be levied without impairing the obligation of such contract.

2. The existence of this contract and its binding efficacy was concluded by the thing adjudged.

3. The tax provided by the act of 1900 was discriminatory and repugnant to section 5219 of the Revised Statutes. Now, although

the circuit court enjoined the assessment and collection of
130 taxes for the years prior to March 21, 1900, it did so, not upon the consideration and determination of the questions of contract or *res adjudicata*, but solely upon the question of discrimination. So far, however, as respected any taxes subsequent to March 21, 1900, were concerned, they were not disposed of, for the decree expressly provided as follows:

"The defendants are at liberty to make assessment of and upon said shares for taxation for any proper time or period after March 21 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendant elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

"Fourth. And the court hereby retains control of this cause, for the purpose of adjudicating and settling any of the shares of the capital stock of the complainant at any time between the entry of this judgment, and the expiration of the present and existing articles of incorporation of the complainant."

Whilst the decree on its face thus unambig-ously discloses that the court did not finally dispose of the entire controversy made by the pleadings, an inspection of the opinion of the court makes it perfectly clear that the court did not intend to and did not dispose of the entire controversy which was involved in the cause.

The only opinion pronounced was that rendered on the decision made upon the application for a preliminary injunction. Though
in that opinion some reference was made by the court to the
131 contentions of contract and *res adjudicata*, the court expressly declared that it would not make a "final expression on the question," but would leave that subject open for further consideration. And when the court came to render the decree which is appealed from, making the injunction permanent, although it in substance reiterated the provisions of the order allowing the preliminary injunction, it added thereto the fourth paragraph, expressly retaining the cause "for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant, at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant."

The court below, in effect, having reserved for future determination the right of the complainant below to enjoin the collection of a municipal tax for 1900, and subsequent years, this court obviously cannot decide that controversy. Matters within the pleadings having been left undetermined and the cause having been retained for the purpose of thereafter passing on them and for the entry of a further decree, the decree entered was not final. (McGourkey *v.* Toledo & O. C. R. Co., 156 U. S. 536, 545, 546, and cases cited.) As a necessary result this court cannot adjudicate upon the contention respecting that portion of the issue which was actually determined by the circuit court, because a decree of a circuit court

upon the merits can be reviewed here only by appeal, which cannot be taken until after a final decree has been made disposing of the whole cause. The case is not to be brought here in fragments by successive appeals. (Southern Railway Co. *v.* Postal Telegraph Co., 179 U. S. 641, 644, and cases cited.)

Appeal dismissed.

True copy.
Test:

____ ____,
Clerk Supreme Court U. S.

132 And, on a day following, to-wit, on July 7th, A. D. 1902 an answer was filed herein which was and is in words and figures following, to-wit:—

Answer.

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, a Corporation,
vs.
THE CITY OF COVINGTON, a Municipal Corporation, and JOHN N. Middendorf, Assessor of the City of Covington.

Without waiving either their demurrer or plea to the jurisdiction heretofore filed herein, but relying on same, the defendants, City of Covington, and John N. Middendorf, for answer herein, say: They deny that the Hewitt law set forth in the bill of complaint herein, now constituted, or ever constituted, an irrevocable contract between the complainant and the State of Kentucky, and allege that the same was repealed by the act of November 11th, 1892, referred to in said bill. They further allege that said Hewitt law never *nah* any effect or operation as between the complainant, or any other national bank, and the State of Kentucky, the same being unconstitutional and void in so far as it applied to national banks.

They deny that, either the Campbell circuit court or the 133 Kentucky court of appeals ever adjudged the said Hewitt law to be an irrevocable contract between the complainant and said State, and deny that the defendants are now estopped by any judgment of either of said courts from proceeding to assess the shares of stock in complainant under the act of March 21st., 1900, set forth in the bill of complaint herein. The judgment of the Campbell circuit court, affirmed by court of appeals relied on by complainant, as an estoppel herein, was in a suit to enjoin the taxation of the franchise of complainant, and did not necessarily involve any question of contract.

As to any change of ownership of shares of stock in complainant, or the death or non-residency of the owners thereof, the defendants have no knowledge or information sufficient to form a belief, and

therefore deny that there has been any change of ownership of any of the shares of stock in complainant during the years in controversy, and ask that complainant be required to disclose all the facts in regard thereto.

The defendants deny that, during all or any of the years in controversy, (1893 to 1902), there was no law in Kentucky provising for the assessment of complainant's shares of stock, and deny that there was during said time, no law of Kentucky authorizing municipal taxation thereof, and allege that, during all the said years, the shares of stock, in national banks were subject to taxation in Kentucky, for all purposes, State and local.

They deny that the said act of March 21st., 1900, is inconsistent with section 5219 of the Revised Statutes of the United States, or discrimination against the shares of stock in national banks, or is unconstitutional, or invalid in any respect.

Further answering, the defendants say, they do not propose to assess said shares, or to collect taxes thereon, otherwise than as authorized and provided for by section 5319, Revised Statutes of the
134 United States, and the said act of March 21st., 1900.

The assessments and rates of taxation proposed are as follows:

1893	$2.07 on each $100. on a valuation of $600 000.
1894	2.09½ on each $100. on a valuation of $600 000.
1895	2.00 on each $100. on a valuation of $600 000.
1896	2.00 on each $100. on a valuation of $600 000.
1897	2.00 on each $100. on a valuation of $600 000.
1898	1.75 on each $100. on a valuation of $300 000.
1899	1.75 on each $100. on a valuation of $300 000.
1900	1.90 on each $100. on a valuation of $300 000.
1901	2.00 on each $100. on a valuation of $325 000.
1902	1.84½ on each $100. on a valuation of $205 000.

The above valuations are the par values of the said shares, with the surplus of the bank added thereto and the assessed valuation of the real estate of said bank for each of said years, deducted therefrom, leaving the valuation as above set out; and the same are far below the market value thereof. The defendants say that the board of equalization for the year 1902 assessed the shares of stock of said bank at two-thirds of their par value, plus the surplus, and from said amount said board deducted the assessed valuation of the real estate of said bank, leaving the valuation of said shares of stock for the year 1902 at two hundred and five thousand ($205000.) dollars, and that the same is far below the market value thereof.

The above rates of taxation are the same as those imposed upon all other property of the city, not exempted by section 170 of the State constitution.

The defendants have assessed the real estate of said bank
135 for each of said years respectively, but the assessed valuation of same has been deducted from the assessed valuation of the stock as aforesaid, and is not taken into consideration in arriving at

the assessed valuation of the stock of said bank for said year or any of said years.

As to any taxes which complainant may have paid the State or any person claiming to act for the State, under the Hewitt law, after the same had been repealed, any such payment was unauthorized and contrary to law. Besides, the said act of 1900 provides for reimbursement of the bank, in the event of any such payment.

As to any distribution of stock among stockholders in 1897 (referred to in bill of complaint), at the time of any such distribution, the City of Covington held a superior lien upon any and all such shares for the amounts of taxes now claimed thereon, which lien attached at the date of each annual levy, and could not and cannot "be defeated by gift, devise, sale, alienation, or any means whatever." Any such distribution was made with knowledge, both actual and constructive, of said superior lien in favor of the city, on the part of the complainant and the stockholders therein. Both the complainant and the stockholders therein are now estopped from denying their knowledge of the city's said superior lien, and are also estopped from relying upon any such distribution as a ground for injunction herein.

Having fully answered, the defendants pray, that the bill of complaint herein be dismissed. They pray for their costs herein expended, and for such other relief as the equity of the case may require.

F. J. HANLON,
City Solicitor,
W. H. JULIAN,
HARVEY MYERS,
Att'ys for Defendants.

136 I hereby certify that the foregoing pleas set forth in the above answer are well founded in point of law.

F. J. HANLON,
City Solicitor.

DISTRICT OF KENTUCKY, }
County of Kenton. }

W. A. Johnson, mayor of the city of Covington, and John N. Middendorf, city assessor of the city of Covington, say they are two of the above named defendants and that the foregoing pleas are true in point of fact, and are not interposed for delay.

W. A. JOHNSON.
JOHN N. MIDDENDORF.

Subscribed and sworn to before me by said John N. Middendorf and W. A. Johnson, this 5th day of July, 1902.

R. J. BEIMFORDE,
N. P., K. C., Ky.

And, on a day following, to-wit, on July 15th A. D. 1902 an entry was made herein which was and is in words and figures following, to-wit:

Order Book "I," page 511.

This day came the complainant and moved the court to set aside the filing of the answer of defendants, filed in the clerk's office at July rules. Argument was heard on said motion and the
137 court not being fully advised takes time with leave to both sides to file briefs.

And, on the same day, to-wit, on July 15th, A. D. 1902, motion was filed herein which was and is in words and figures following, to-wit:

Motion.

In the Circuit Court of the United States for the Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON and JOHN N. MIDDENDORF, Assessor of the Said City of Covington, Defendants.

Motion by the complainant to set aside the filing and take from the files answer of defendants. Filed on July 7th, 1902.

Now comes complainant, First National Bank of Covington, Ky., by its counsel, James W. Bryan, and moves the court to set aside the filing of, and take from the files, the answer of defendants, City of Covington and John N. Middendorf, assessor of said city of Cov-
ington, to the bill of complaint herein and amendment to
138 said bill, filed in the clerk's office herein, on July 7th, 1902, upon the following grounds, to-wit:

First. Said answer was filed without leave of court so to do.

Second. Said answer was filed too late, the defendant's plea to the jurisdiction of this court, and their demurrer to the bill of complaint herein and the amendment thereto, were on December 17th, 1900, by the court disallowed and overruled, and the said defendants failed to answer upon the next or any succeeding rule day thereafter, or until July 7th, 1902.

Third. That by stipulation in writing signed by the parties to this action, by their respective counsel, heretofore filed, to-wit, on December 17th, 1900, the said defendants advised this court that they did not desire to answer the bill of complaint herein, or to plead further thereto, and refused so to do.

Fourth. Said answer puts in issue in this action matters fully and finally determined by the judgment rendered herein on December

17th, 1900, to-wit: the right of said defendants, or either of them, to make any assessment or levy of any taxes upon the shares of the capital stock of this complainant against it or any of its shareholders, for any purpose, for any time or period previous to March 21, 1900, which judgment has never been set aside or modified or reversed, and is still in full force and effect.

Fifth. Said answer is evasive and not responsive to the allegations of the bill of complaint and not in accordance with the order of the court entered herein on December 17th, 1900, permitting the said defendants, should they elect — to do, to present further pleadings or evidence upon which this court should determine the right of said defendant to collect any taxes upon this complainant's
139 shares of stock for any time or period subsequent to March 21st, 1900, which they were permitted to assess and whether the taxes so assessed were at a higher rate than was permitted by law and to what extent, which judgment and order has never been set aside or modified or reversed, and still is in full force and effect.

JAMES W. BRYAN,
Solicitor for Complainant.

I hereby certify, as counsel for complainant in the foregoing motion that, in my opinion, the same is well founded in point of law, and proper to be filed.

J. W. BRYAN,
Solicitor for Complainant.

Frank P. Helm, president of complainant, makes oath that the foregoing motion is not interposed for delay of the cause in which it is filed.

FRANK P. HELM.

Sworn to and subscribed before me this 14th day of July 1902.

W. A. PRICE,
Notary Public, Kenton Co., Ky.

My commission expires January 25th, 1904.

And, on a day following, to-wit, on October 7th. A. D. 1902 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 561.

THE FIRST NATIONAL BANK, &c., }
v.
THE CITY OF COVINGTON ET AL. }

140 This cause coming on to be heard upon motion of respondent to modify the injunction heretofore granted herein, the court now being fully advised overruled said motion, to which ruling respondents by their attorney comes and excepts.

Coming on further to be heard *on* complainant's motion to set aside the filing and take from the files the answer of defendants, filed herein on July 7th., 1902, the court being advised sustains said motion, to which ruling of the court, defendants by counsel come and except*s*.

And, on a day following, to-wit, on October 15th., A. D. 1902 a motion was filed herein which was and is in words and figures following, to-wit :—

Motion.

United States Circuit Court, Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
CITY OF COVINGTON ET AL., Defendants.

Defendants move the court to re-consider the order entered herein on October 7th., 1902, sustaining the motion "to strike the answer of defendants from the files," and to re-consider the same.

W. H. JULIAN &
F. J. HANLON,
Attorneys for Defendants

141 And, on a day following, to-wit, on January 3rd, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:

Order Book "I," page 613.

This day came the defendants, The City of Covington and John N. Middendorf, assessor, and move the court that the interlocutory decree entered herein on *on* December 17th, 1900 be set aside for the purpose only of allowing the defendant- to answer and that the defendants be now allowed to file herein the answer this day tendered and offered to be filed.

Came the complainant and objected to the granting of said motion. Whereupon argument was heard and the court now being fully advised overrules said motion and refuses to allow said answer, so tendered, to be filed, to which ruling of the court defendants by counsel come and except.

And, on a day following, to-wit, on January 6th, A. D. 1903 motion was filed herein which was and is in words and figures following, to-wit:

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON ET AL., Defendants.

Motion to set aside the interlocutory decree entered herein on December 17, 1900, and to file answer.

142 The defendants, The City of Covington, and John N. Middendorf, assessor, move the court: that the interlocutory decree entered herein on December 17th, 1900, be set aside, for the purpose only of allowing the defendants to answer, and that the defendants be now allowed to file herein, the answer this day tendered and offered to be filed.

F. J. HANLON,
W. H. JULIAN,
For Defendants.

And, on the same day, to-wit, on January 6th, A. D. 1903 answer was tendered herein which was and is in words and figures following, towit:

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, a Corporation, Complainant,
v.
THE CITY OF COVINGTON, ETC., Defendants, Respondents.

Answer.

Without waiving either their demurrer or plea to the jurisdiction heretofore filed herein, but relying on same, the defendants, City of Covington and John N. Middendorf, for answer herein say: They deny that the Hewitt law set forth in the bill of complaint herein, now constituted, or ever constituted, an irrevocable contract between the complainant and the State of Kentucky, and allege that the same was repealed by the act of November 11th, 1892, referred to in said bill. They further allege that said Hewitt law never
143 had any effect or operation as between the complainant, or any other national bank, and the State of Kentucky, the same being unconstitutional and void in so far as it applied to national banks.

They deny that, either the Campbell circuit court or the Kentucky court of appeals ever adjudged the said Hewitt law to be an irrevocable contract between the complainant and said State, and deny that the defendants are now estopped by any judgment of either of

said courts from proceeding to assess the shares of stock in complainant under the act of March 21st., 1900, set forth in the bill of complaint herein. The judgment of the Campbell circuit court, affirmed by court of appeals relied on by complainant, as an estoppel herein, was in a suit to enjoin the taxation of the franchise of complainant, and did not necessarily involve any question of contract.

As to any change of ownership of shares of stock in complainant, or the death or non-residency of the owners thereof, the defendants have no knowledge or information sufficient to form a belief, and therefore deny that there has been any change or ownership of any of the shares of stock in complainant during the years in controversy, and ask that complainant be required to disclose all the facts in regard thereto.

The defendants deny that, during all or any of the years in controversy, (1893 to 1902) there was no law in Kentucky providing for the assessment of complainant's shares of stock, and deny that there was, during same time, no law in Kentucky authorizing municipal taxation thereof, and allege that, during all the said years, the shares of stock in national banks were subject to taxation in Kentucky, for all purposes, State and local.

They deny that the said act of March 21st., 1900, is inconsistent with section 5219 of the Revised Statutes of the United States, or discriminates against the shares of stock in national banks,
144 or is unconstitutional, or invalid in any respect.

Further answering, the defendants say, they do not propose to assess said shares, or to collect taxes thereon, otherwise than as authorized and provided for by section 5219, Revised Statutes of the United States and the said act of March 21st., 1900.

The assessments and rates of taxation proposed are as follows:—

1893 $2.07 on each $100. on a valuation of $600 000.
1894 2.09½ on each $100. on a valuation of $600 000.
1895 2.00 on each $100. on a valuation of $600 000.
1896 2.00 on each $100. on a valuation of $600 000.
1897 2.00 on each $100. on a valuation of $600 000.
1898 1.75 on each $100. on a valuation of $600 000.
1899 1.75 on each $100. on a valuation of $300 000.
1900 1.90 on each $100. on a valuation of 300 000.
1901 2.00 on each $100. on a valuation of $300 000.
1902 1.84½ on each $100. on a valuation of $205 000.

The above valuations are the par values of the said shares with the surplus of the bank added thereto, and the assessed valuation of the real estate of said bank for each of said years, deducted therefrom, leaving the valuation as above set out; and the same are far below the market value thereof. The defendants say that the board of equalization for the year 1902 assessed the shares of stock of said bank at two-thirds of their par value, plus the surplus and from said amount said board deducted the assessed valuation of the real estate of said bank, leaving the valuation of said shares of stock for the year 1902 at two hundred and five thousand ($205 000.) dollars, and that the same is far below the market value thereof.

The above rates of taxation are the same as those imposed upon all other property of the city not exempted by section 170 of the State constitution.

145 The defendants have assessed the real estate of said bank for each of said years respectively, but the assessed valuation of same has been deducted from the assessed valuation of the stock as aforesaid, and is not taken into consideration in arriving at the assessed valuation of the stock of said bank for said year or any of said years.

As to any taxes which complainant may have paid the State or any person claiming to act for the State, under the Hewitt law after the same had been repealed, any such payment was unauthorized and contrary to law. Besides, the said act of 1900 provides for reimbursement of the bank, in the event of any such payment.

As to any distribution of stock among stockholders in 1897 (referred to in bill of complaint at the time of any such distribution, the city of Covington held a superior lien upon any and all such shares for the amounts of taxes now claimed thereon, which lien attached at the date of each annual levy, and could not and cannot "be defeated by gift, devise, sale, alienation, or any means whatever." Any such distribution was made with knowledge, both actual and constructive, of said superior lien in favor of the city, on the part of the complainant and the stockholders therein. Both the complainant and the stockholders therein are now estopped from denying their knowledge of the city's said superior lien, and are also estopped from relying upon any such distribution as a ground for injunction herein.

Having fully answered, the defendants pray that the bill of complaint herein be dismissed. They pray for their costs herein expended, and for such other relief as the equity of the case may require.

F. J. HANLON,
City Solicitor,
W. H. JULIAN,
HARVEY MYERS,
For Defendants.

146 I hereby certify that the foregoing pleas set forth in the above answer are well founded in point of law.

F. J. HANLON,
City Solicitor.

DISTRICT OF KENTUCKY, }
County of Kenton. }

W. A. Johnson, mayor of the city of Covington, and John N. Middendorf, city assessor of the city of Covington, say they are two of the above named defendants and that the foregoing pleas are true in point of fact, and are not interposed for delay.

W. A. JOHNSON.

Subscribed and sworn to before me by said John N. Middendorf and W. A. Johnson, this 5th day of January, 1903.

F. J. HANLON,
N. P., K. Co., Ky.

And, on the same day, to-wit, on January 6th, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 613.

This cause coming on to be heard upon the motion of the defendants to set aside the order of October 7th, 1902, striking from the files the answer heretofore filed herein and to reconsider same—argument was heard upon said motion and the court now being fully advised overrules the same, to which ruling of the court, defendants except.

147 And, on the same day, towit, on January 6th, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:

Order Book "I," page 613.

This cause coming on to be heard generally upon the pleadings and the evidence, came the attorneys for the parties and made argument before the court upon all the questions arising in the case. The court not now being fully advised of the judgment it is proper to render herein, takes time, and said cause is generally submitted for judgment.

And, on a day following, to-wit, on May 19th, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "J," page 78.

This day the court having fully considered the matter herein and being now fully advised files its written opinion herein:

And, on the same day, to-wit, on May 19th, A. D. 1903 opinion mentioned in the foregoing entry was filed herein which was and is in words and figures following, to-wit:—

148 United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, Complainant,
v.
THE CITY OF COVINGTON ET AL., Defendants. } # 2195. Opinion.

The Supreme Court of the United States, upon the appeal from the decree entered herein December 17", 1900, held that said decree was

not final, but interlocutory and hence not appealable (186 U. S. 270). It did so because the decree did not dispose of the entire controversy presented by the pleadings herein. That controversy involves the right of the defendant, City of Covington, under the act of March 21", 1900, to collect from complainant any taxes whatever, *i. e.* taxes for the years after that date until the expiration of its charter, November 17", 1904, as well as taxes for the years prior thereto since the adoption of the revenue law of 1892. A single ground is urged by complainant for non-liability on its part for taxes under said act for any period of time either before or after its passage. That ground is that in a former suit brought by it against said defendant in the circuit court of Kenton county, Ky., afterwards transferred to the circuit court of Campbell county and appealed to the court of appeals of Kentucky to enjoin the collection of city taxes from it for the year 1893 under said revenue law of 1892, it was adjudged by the two latter courts that it had an irrevocable contract with the State of Kentucky under the Hewitt law of 1886 by which it was exempted until the expiration of its charter, November 17", 1904, from all
149 other taxes than that provided by said law and, because thereof, it was not liable for city taxes for said year 1893 under said revenue law of 1892. The opinion of the court of appeals rendered in said case is contained in 97 Ky., p —. An additional ground is urged for non-liability on complainant's part to defendant for taxes under said act of March 21", 1900, prior to its passage and that is that said act, in so far as it relates to taxes for that period of time, is discriminatory and repugnant to section 5219 U. S. Revised Statutes. Judge Evans held that said portion of said act was invalid on this ground and because of this enjoined and restrained the defendants from assessing complainant's property under said act for said years. This is all the farther the decree goes. He did not determine whether complainant was liable for no taxes at all on the ground relied on by it in support of its contention that it was not and hence the decree leaves the controversy as to taxes after March 21", 1900 undisposed of.

The decree not being final but interlocutory for the reason stated, I have the power to set it aside if I think that it is wrong and see fit to do so. But it is one thing for me to have such power and another for it to be proper for me to exercise that power. The decree was entered by Judge Evans after due consideration of the questions involved. I am of equal rank with him and have no appellate jurisdiction over his action. Comity requires, therefore, that I should permit it to stand so far as it goes. In allowing it to stand on this ground I do not mean to intimate any doubt as to the correctness of the position upon which he based it. I have simply refrained from any consideration of it, being under no necessity to do so.
150 It is incumbent upon me, however, to dispose of so much of the controversy as relates to the taxes after March 21", 1900, which has been left undisposed of by Judge Evens. The liability of complainant for these taxes depends entirely upon the correctness of the position taken by it that it was not liable for any

taxes under said act either before or after its passage because of the adjudication hereinbefore referred to, and, if well taken it affords an additional reason for permitting Judge Evans' action to stand.

It is certain that if I am free to determine the question whether complainant by its acceptance of the Hewitt law in 1886 acquired an irrevocable contract from the State of Kentucky exempting it from all other taxation than that provided in said law until the expiration of its charter, on its merits I would have to hold that it did not thereby acquire such a contract.

Bank Tax cases, 102 Ky. 174.
Citizens' Saving Bank *v.* Owensboro 173 U. S. 630.

And complainant so concedes. Its sole reliance is on the adjudication in the former suit. It claims that the question as to whether it so acquired such a contract is *res judicata*—a thing adjudged—and that it cannot now be claimed that it did not.

It is certain that in said suit it was adjudged by the Campbell circuit court and afterwards on appeal by the court of appeals that such a contract had been made by the State of Kentucky with complainant and that it was irrevocable. Both courts delivered written opinions and both opinions are made part of complainant's bill. It is true that the Campbell circuit court also adjudged that the
151 taxes levied by the Revenue Law of 1892 upon national banks were franchise taxes and hence invalid and that on this ground as well as the existence of the contract complainant was not liable for the taxes of 1893. But the latter was the main ground of its action and such was the only ground upon which the court of appeals based the affirmation of its judgment.

The defendants urge several reasons why the former adjudication should not be accepted in this suit as conclusive of the existence of such an irrevocable contract in complainant's favor. They say that this suit is upon an entirely different cause of action. It is a suit to enjoin the collection of taxes for subsequent years authorized to be collected by another and subsequent act of the legislature. This is undoubtedly true. But does this fact make any difference? I think not. It is well settled that a thing adjudged in a former suit cannot be questioned in a subsequent suit between the same parties although the latter is upon an entirely different cause of action. In the case of

Southern Pac. Ry. Co. *v.* U. S. 168 U. S. 45

Mr. Justice Harlan said:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies be taken as conclusively

established, so long as the judgment in the first suit remains
152 unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined."

This principle has been applied by the Supreme Court of the United States in cases where the two suits related to different years taxes.

City of New Orleans *v.* Citizens Bank of La. 167 U. S. 371
Baldwin *v.* Maryland 179 U. S. 220

In the former case Mr. Justice White points out that "the argument that because a tax of one year is a different cause of action from the tax of a subsequent year, therefore, a demand for a tax of a subsequent year can never be concluded by the thing adjudged in the prior year admits the relevancy of *res adjudicata* to demands for taxes, but contends that -herein there are different demands the thing adjudges has no application, although the last demand may depend upon a question which has previously been determined under the same facts and circumstances."

To this argument he responds thus:

"The proposition that because a suit for taxes of one year is a different demand from the suit for a tax for another, therefore, *res judicata* cannot apply; whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists
153 even although there be different demands when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule stated in the text books and enforced by many decisions of this court."

To the argument that "it would be intolerable to recognize that a judgment as to the tax of one year could be conclusive as to the tax of a subsequent year," and that "as a matter of public policy and public necessity the principles of the thing adjudged can never apply to taxation," he responds thus:

"The argument that, as a matter of public policy the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the law-making and not to the judicial department. But, if the judicial mind could entertain the suggestion, it seems clear that it is not without real merit. In its ultimate aspect it asserts that no question concerning government, or public authority, ought ever to be sub-

mitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial power on the one hand and to deny on the other the very substance and essence of such power is not only contradictory but destructive of the fundamental conceptions upon which our system of government is based. Under
154 this theory the case under consideration should not be entertained, but should be dismissed. Accepting this argument in its full consequence every judgment rendered by this court from the foundation of the Government, declaring a particular tax, or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly of the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

In the latter case, Mr. Justice Brewer said:

"The controversy in the case reported in 85 Md. 145, 36 Alt., 764 was one between the estate of the ward and the State of Maryland. In that case the right of the State to compel a payment by the estate of the ward of taxes levied thereon for the years 1893 and 1894 was settled. * * * The matter has become *res judicata* between the estate and the State. There is no pretense that the taxes of 1895 stand in any other condition as to the matter of fact than the taxes of 1893 and 1894 which were in terms included within the litigation settled by the decision referred to. The ruling, therefore, as to the taxes for 1895 comes within the force of that decision, and is determined by the conditions in respect to the taxes of 1893 and 1894. Johnson Stree- R. Co *v.* Wharton 152 U. S. 252, Last Chance Mining Co. *v.* Tyler Mining Co. 157 U. S. 683, New Orleans *v.* Citizens Bank 167 U. S. 371."

And it has been applied by the circuit court of the district of Kentucky and the Supreme Court of the United States in cases exactly like the one in hand, save in a particular herein-
155 after referred to.

Bank of Kentucky *v.* Stone 88 Fed. 394.
Northern Bank *v.* Stone 88 Fed. 413
Farmers Bank *v.* Stone 88 Fed. 987
Louisville Banking Co. *v.* City of Louisville 88 Fed. 988
Third National Bank *v.* City of Louisville 88 Fed. 990
Stone *v.* Farmers Bank 174 U. S. 1037
Stone *v.* Bank of Kentucky 174 U. S. 1187
City of Louisville *v.* Louisville Banking Co. 174 U. S. 1187
Stone *v.* Deposit Bank 174 U. S. 1187

Again defendants urge that this suit is not only to enjoin the collection of different years taxes, but taxes imposed on the shares of stock of national banks by the act of March 21", 1900, whereas the former suit was to enjoin the collection of taxes levied on the franchise of national banks by the revenue law of 1892, which law, by reason of the fact that the taxes were so imposed, was invalid; and the collection of which taxes complainant was entitled to have enjoined on this ground alone, without reference to the question whether it had an irrevocable contract exempting it from other taxes than those imposed by the Hewitt law. This, too, is undoubtedly true—

Owensboro Nat. Bank *v.* Owensboro 173 U. S. 664

It is in this particular that this case is unlike the cases hereinbefore cited which otherwise are, as stated, exactly like it. In all of them except that of

Third National Bank *v.* City of Louisville, 88 Fed. 990,

the banks involved were State banks, and in that case, the circuit court for the district of Kentucky held that the revenue
156 law of 1892 was valid in so far as it affected national banks, basing its judgment entirely on the former adjudication as to the existence of an irrevocable contract under said Hewitt law in favor of said bank and the Supreme Court of the United States affirmed said judgment on the ground that said revenue law of 1892 was invalid as to national banks, and waived a consideration of the effect of said former adjudication—

City of Louisville *v.* Third National Bank, 174 U. S. 1037

Does then the fact that said revenue law was invalid as to national banks and complainant was entitled in the former suit to an injunction against the collection of the taxes for the year 1893 imposed by said law on this ground alone without reference to the question as to whether it was invalid as to complainant also because it impaired the obligation of an irrevocable contract between it and the State uncer the Hewitt law, make any difference? I do not think that it does. The fact that the judgment of a court in a suit might have been based upon another ground than that on which it was actually based does not prevent the determination that such ground existed being conclusive as to its existence in a subsequent suit between the same parties if its existence was in issue in the former suit and properly formed the basis of the judgment therein. Likewise if a judgment in a suit is properly based upon two grounds the determination therein that both grounds exist is conclusive as to the existence of either ground in a subsequent suit between the same parties. In Black on Judgment vol. 2 p. 604, it is said that one of the two main rules which govern the law of estoppel by judgment, as the same may be deduced from the general result of all the authorities, is as follows:—

157 "A point which was actually and directly in issue in a former suit and was there judicially passed upon and deter-

mined by a domestic court of competent jurisdiction, cannot be again drawn in question in any further action between the same parties or their privies, whether the cause of action in the two suits be identical or different."

And again on page 729 it is said:

"It is a fundamental and unquestioned rule that a former judgment, when used as evidence in a second action between the same parties or their privies, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined."

No exception is stated to this general rule growing out of the fact that other points or facts were directly in issue in the former suit and were or might have been litigated and determined therein, and formed the basis of the judgment therein. As a counter-rule it is stated on page 733 that the judgment is not conclusive "of any matter which was incidentally cognizable in that action or which came collaterally in question, nor of any matter to be inferred by argument and construction from the judgment." And, on page 734 it is said that an important analogy to this counter-rule "is found in the case of opinions of the appellate courts considered as authoritative statements of the law. A point may be considered and passed upon by the court which comes only incidentally in question and is not necessary to the determination of the case. In that event, the decision, so far as concerns that point, is merely *obiter dictum*, and not entitled to the weight of a precedent." "But," he adds, "where the record in an action of which the court has jurisdiction fairly presents two points, upon either of which the decision might
158 turn, and the court fully considers and determines both, the decision of neither can be considered as an *obiter dictum* and the judgment is authorized on both points."

This latter statement of the law as to the authoritativeness of a decision of an appellate court upon two points involved in a case before it, upon either of which the decision might turn, in subsequent cases involving either one of them finds support in the case of

Howes *v.* Water Co. 5 Sawy. 287; Fed. Cas. 6235

The question decided in that case was whether the court in construing a State statute involved therein was bound to follow a decision of the higher court of that State construing that statute. It is well settled that the Federal court must follow the construction put upon a statute by the highest court thereof and equally well settled that it is not bound to do so if the decision of the State court is a mere dictum. The sub-question in that case was whether the decision of the State court which it was claimed the Federal court should follow was a dictum or not. Judge Sawyer said:

"There were two grounds relied on to show that this was not a proper case for exercising the jurisdiction; (1) That the board of supervisors is a legislative body having a discretion to pass ordinances, and that the court ought not to interfere with its legislative

discretion in advance on the hypothesis that it intends to pass an alleged ordinance, especially when it cannot be known in advance what its intention as a legislative body is; (2) that the city had a right to the water claimed, and a right to take the measures alleged to secure it in case the petitioner should shut it off; and for that reason, also, there was not a proper case for the prohibitory writ. Both grounds were distinctly and squarely presented
159 by the record, and relied on, and the latter more especially fully argued by counsel. The court might just as well have rested its decision on the second ground, if found good, without noticing the first, as upon the first without noticing the second. Or, it might, if thought proper have decided both, as it did. It is a matter of almost every day occurrence that the record presents two or more points, either of which, if sustained, would determine the case and the court decides them all. In such cases it can no more be said that one rather than another is obiter. In this case the court was earnestly presses by counsel on both sides to decide the case on its merits, and give an authoritative construction of the statute. The great anxiety was to ascertain the right of the respective parties and the mode was of no consequence. * * * To say now that the construction of the statute was merely obiter is to say that a vast amount of labor, research, energy and anxiety was expended by counsel and court to no real purpose. * * * It is the very point upon which nearly all of the effort and research of counsel and court were actually expended. This discussion did not in anywise serve to illustrate the other point. Indeed, it had no relation whatever to it. It was a distinct, separate and independent point, and the only one in the case that counsel or parties practically cared anything about. * * * I regard the construction put upon the clause in controversy by the Supreme Court in the prohibitive case cited, as authoritative, and being so, I rest my decision upon that case, without examining the question as an original proposition."

If, then, a decision by an appellate court of a point upon which a case turns, when there is another point upon which it might equally turn or of both points is authoritative in subsequent cases in
160 the one instance as to the one point or in the other as to either point on the principle of *stare decisis*, or on the principle which govern- Federal courts in following the highest court of a State in construing its statute it is equally authoritative on the principle of *res judicata* in a case involving that principle. In the former suit between complainant and defendant—City of Covington, the case turned on either of the two grounds hereinbefore stated. It was made to turn by the Campbell circuit court on both grounds, mainly, however, on the ground that complainant had an irrevocable contract and, by the court of appeals solely upon that ground. The decision therein that complainant had such a contract must therefore be accepted as conclusive in this State, notwithstanding the fact that the former suit could have been made to turn solely on the other ground, to-wit:—that the revenue law of 1892 was invalid as to national banks because the taxes which it imposed on them were

upon their franchises, which the legislature of Kentucky had no power to do. Had the State courts in the former suit granted complainant the relief which it sought therein without giving any intimation as to the ground upon which they granted it then, the judgment therein would not have been conclusive herein upon the question as to whether complainant had an irrevocable contract. For then it could not be told upon what ground complainant had been granted that relief and it is well settled that estoppels must be certain. In the case of

Russell *v.* Place 94 U. S. 606

Mr. Justice Field said:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear,
161 either upon the face of the record or be shown by intrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indication which of them was thus litigated and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to new contention, unless this uncertainty be removed by intrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible."

But no such uncertainty exists here. The sole ground upon which complainant in the former suit sought to have the revenue law of 1892 declared invalid as to it and to enjoin collection of taxes by the defendant city under it for the year 1893 was the existence of said irrevocable contract and the Campbell circuit court granted it that relief on that ground, though it did so on the other ground also and the court of appeals affirmed its judgment on that ground alone. This is made clear by the records in the former suit and there is no uncertainty whatever in regard to it.

Still further defendants urge that the courts of Kentucky, if this suit were pending therein, would give no such effect to the adjudication in the former suit relied on herein and, therefore, this court should not give it any such effect. In support of their contention that the courts of Kentucky give no such effect thereto they cite the following cases, to wit:

162 City of Newport *v.* Commonwealth 50 S. W. 845 51 S. W. 433
Louisville Bridge Co. *v.* City of Louisville, 58 S. W. 598
Negley, sheriff, *v.* City of Henderson, 59 S. W. 19
Bell Co. C. & I. *v.* City of Pineville, 64 S. W. 525
City of Frankfort *v.* Deposit Bank 65 S. W. 10
Louisville Bridge Co. *v.* City of Louisville 65 S. W. 814

The case of City of Newport *v.* Commonwealth was a suit by the State against the city of Newport to recover taxes under the revenue law — 1892 for the year 1894 on the franchise of said city to operate waterworks. Several defenses were made to the suit. Amongst others was a plea of *res judicata*. It was alleged that suit had been brought against the city to recover taxes under said law of 1892 for the year 1893 on said franchise and same had been dismissed by the circuit court, which judgment had never been set aside or reversed. It was claimed that this judgment made the question as to the liability of said city for franchise taxes under said law a thing adjudged and was conclusive on the question. It was held by the court that the judgment in the former suit did not have this effect. And it would seem that the judgment of the majority of the court was placed upon the broad ground that in no case and to no extent could a judgment in a suit as to one year's taxes be *res judicata* as to another year's taxes. Judge Durelle in stating the opinion of the majority of the court based the holding on this reasoning, to-wit:—

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue decided that a contract, out of which several distinct promised to pay money arose, has been adjudged invalid in a suit upon one of these promises, the judgment is an estoppel to a suit upon another promise founded on the
163 same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The tax-payer does not agree to pay; and the right to litigate the legality of a tax upon all grounds must, of necessity, exist regardless of former adjudications as to the validity of a different tax."

And again:

"In our opinion it would be against public policy to hold that a judgment of a circuit court upon a question of taxation is forever binding upon this court, not only as to the taxes there in litigation, but also as to taxes for all subsequent years merely because counsel for the Commonwealth failed to bring the question here. Such a ruling would seem to be open to the objection that it would hold the Commonwealth bound by the laches of its officer."

It appears, from his response to a petition for re-hearing that the minority of the court composed of three out of the seven judges desired an extension of the opinion so as to include the qualification upon the general rule laid down as to the application of the doctrine of *res judicata* in tax cases, to-wit:—

"But whether the State is bound by a former adjudication that there exists a contract exempting from taxation, or as to the construction of such contract, is a question not necessarily involved here, and to the decision of which it may be that different principles apply. There would seem to be an essential difference between the Commonwealth exercising the highest of its sovereign powers—a power necessary to its very existence—and the same Commonwealth, its sovereignty laid aside, bending itself as a mere corporate entity by a sealed instrument. But, it is not necessary, in our judg-

ment, to go into this question, nor even to decide that there is a difference."

The two cases styled alike Louisville Bridge Company *v.*
164 City of Louisville were two suits by said city against the bridge company, the one to recover city taxes on its bridge—its tangible property—for the years 1890, 1891, 1892, 1893 & 1894—the other, to recover same on same for the years 1895 and 1896, and also city taxes on its franchise—its intangible property—for the years 1894, 1895, 1896 and 1897. In the case of Louisville Bridge Company *v.* City of Louisville, 81 Ky. 189, which was a suit by said city against said bridge company to recover city taxes on its bridge for the year 188- it had been held that the said bridge was not liable to city taxes because it was not the recipient of the benefits of municipal government. This former adjudication was relied on as a bar in the two subsequent suits to recover taxes for the latter years. It was held that it was not a bar. In the former of the two cases Judge Burnam said:—

"In response to appellant's plea of *res judicata* it may be said that this identical question was before the court in the case of Henderson Bridge Co. *v.* City of Henderson, decided June 24", 1896, and, in the very recent cases of Newport *v.* Masonic Temple Ass'n 45 S. W. 881, 46 S. W. 697 and City of Newport *v.* Com. 50 S. W. 845, 51 S. W. 433. It was held that a judgment as to the validity of taxes for one year is not conclusive as to the validity of taxes on the same property for another year, and, as the question is fully considered in these cases, it is unneccessary to elaborate it again."

In the latter of the two he said:

"The plea of *res judicata* relied on for reversal has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for it to consider this question; it having been expressly decided that a judgment
165 by a court of competent jurisdiction in a suit for taxes of one year did not constitute a bar in a subsequent suit between the same parties under the same law for another year's tax. See Henderson Bridge Co. *v.* City of Henderson, 90 Ky. 498, 14 S. W. 493; Same *v.* Com. 99 Ky. 623 31 S. W. 486, 29 L. R. A. 73; City of Newport *v.* Com. 50 S. W. 845—45 L. A. R 518."

In regard to these two cases it is to be noted that as to all the taxes involved therein save for the year- 1890 and 1891 there was not the same question as was adjudged in the earlier case in 81 Ky. and, as to those two years it was held that the bridge company was not liable. As to the other years there was not the same question because it had been held in previous cases referred to in said two cases that section 174 of the constitution of Kentucky adopted Sept. 28", 1891 which applied to all years after 1891, had changed the rule in regard to the liability of property in cities and towns not enjoying the benefits of municipal government. The bridge company was held not liable for the years 1890 and 1891 not on the ground of said former adjudication, but because it had acted on it and not collected taxes from its tenants for those years who were

under an obligation to it to pay all its taxes. As to the cases cited by Judge Burnam in said extracts from his opinions in support of the proposition there laid down, none of them are to that effect, save the Newport case, to which we have already referred. The Henderson Bridge cases do not involve any question as to *res judicata*, except that one decided June 24, 1896 and, in that case its decision was expressly waived. The question in the case of Newport *v.* Masonic Temple Ass'n was the same as that involved in the Louisville Bridge Company cases as to taxes after 1891. The charter of the Masonic Temple Ass'n passed March 29", 1880, exempted
166 its property from taxation. It had been sued for taxes for several years prior to the new constitution of 1891 and held not liable because of this exemption. In a suit for taxes after the adoption of that constitution it was held that that instrument repealed said exemption and that hence the former adjudication was no bar to suit for said taxes. The only case so cited which was in point was the Newport Water Works case which is the pioneer and leading authority in Kentucky upon the question under consideration.

The case of Nagley, sheriff, *v.* City of Henderson was a suit by said city against the sheriff of Henderson county to enjoin collection of State and county taxes for the years 1896 and 1897 on its franchise to operate water-works in said city. In support of its claim not to be liable for taxes on said franchise the city alleged in its petition that in a former suit by it against the sheriff the circuit court of Henderson county had enjoined the collection of taxes on its tangible property for the years 1894, to 1897 inclusive. It was held that the former adjudication was not conclusive of the city's right to enjoin said franchise taxes. Judge Durelle said:—

"This brings us to consider the question of *res judicata*. It was in City of Newport *v.* Commonwealth, *supra*, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of *res judicata* against the tax for another year. It seems to us equally clear that it does not create an estoppel against the collection of a different tax upon different property for the same year. If the one proposition be true the other must be true, also."

The case of Bell Co. C. & I. Co. *v.* City of Pineville was a suit by said company against said city to enjoin collection of taxes upon its property within said city for years 1895 to 1898 inclusive on
167 the ground that it was used for farming purposes and derived no benefit from the city government. A judgment in a similar suit of the Bell circuit court enjoining the collection of taxes for the year 1891 on the same ground was plead by the company as concluding the question of its liability for the subsequent year's taxes. It was held that it had no such effect. Judge Durelle said:

"The case of City of Newport *v.* Com. 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518, is decisive of the question raised by this plea of *res judicat*:"

It will be not- here, though not referred to in the opinion, that the

rule as to liability of property in a city not enjoying the benefits of municipal government to city taxation was changed between the year 1891, taxes for which were involved in the former suit, and the years 1895 to 1898 inclusive, taxes for which were involved in the suit in hand, by the constitution of 1891—so that in no event was the doctrine of *res judicata* applicable to the case.

The case of City of Frankfort *v.* Deposit Bank is somewhat novel in its character. The Franklin circuit court in a suit by the city against the bank for taxes for the years 1895 and 1894 under the revenue law of 1892, adjudged under authority of the decisions of the court of appeals in the first bank tax cases that the bank was not liable therefor because it had an irrevocable contract under the Hewitt law of 1886 exempting it from taxation other than under said law. Thereafter in a suit by the bank against the city in the United States circuit court for the district of Kentucky the latter was enjoined from collecting taxes under said revenue law of 1892 for the years 1895 to 1898 inclusive, on the ground of the adjudication that it had such a contract in the former suit in the Franklin circuit court and, that notwithstanding that the court of
168 appeals in the second bank tax cases had over-ruled its decision in the first bank tax cases on authority of which the judgment of the Franklin circuit court had been rendered. This judgment was affirmed by the Supreme Court of the United States on an appeal therefrom by the city.

Stone *v.* Deposit Bank of Frankfort, 174 U. S. 1187

After the decision of the court of appeals in the second bank tax cases, time for an appeal from said judgment of Franklin circuit court not having elapsed an appeal was taken therefrom to the court of appeals and it reversed the judgment on authority of its decision in the second bank tax cases. On the return of the case to the Franklin circuit court the bank plead the judgment of the United States circuit court affirmed by the Supreme Court as to taxes for 1895 to 1898 inclusive which had been based upon said former judgment of Franklin circuit court as to years 1893 and 1894 in bar of the city's right to recover taxes for said years in said suit. It was held that the plea was not good and on appeal to the court of appeals it affirmed the ruling of the lower court. In the opinion after showing that the doctrine of *res judicata* could not be applied in such a case Judge Paynter added:

"However, we do not hold that the judgment of the Federal court is not a bar to a recovery of the taxes for the years 1893 and 1894. This court in City of Newport *v.* Com. 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518 and Louisville Bridge Co. *v.* City of Louisville, 58 S. W. 598 held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes."

This detailed examination of the cases relied on by defend-
169 ants in support of their contention that according to the law, as laid down in the State courts the former adjudication relied on herein is not conclusive of complainant's exemption from

liability for the taxes involved herein, because they are taxes for years different from and subsequent to the year for which the taxes involved therein were levied, leads to the conclusion that the contention is correct thought some if not most of said cases for the grounds stated are not in point and in none of them was the former adjudication based upon an exempting contract covering all of the years' taxes involved in both suits, I think that there can be no question as to this. Complainant cites the cases of

Thompson *v.* Louisville Banking Co. 55 S. W. 1080
Hardwicke *v.* Young 62 S. W. 10

decided by the court of appeals of Kentucky as being contra to defendant's contention in the matter under consideration. These cases, however, are not against that contention. In each case the same year's taxes was not involved in that court on a second appeal. Of course a decision of the court of appeals that a certain year's taxes are invalid is binding as to the validity of that year's taxes on a second appeal of that case to that court. And a holding that its former decision in that same case is binding is not an authority in favor of the position that a decision that one year's taxes rendered in one case is binding in another case as to another subsequent year's taxes.

It must be accepted, therefore, that the State courts, in view of said decisions, would not give the effect to the former adjudication relied on herein by complainant which it contends for and which this court, under the decision of the Supreme Court of the United States, hereinafter cited, would otherwise be bound to give it. It remains to be considered what effect is to be given to this fact.

170 And here we are not without authority proceeding from the Supreme Court. In the case of

Union & Planters Bank *v.* City of Memphis

decided, April 13", 1903, it was held that a former adjudication in State courts between the parties thereto in relation to the liability of the former to the latter for taxes for the years 1889 to 1891 inclusive was not conclusive as to such liability for the year 1899, because it was not conclusive in the State courts. Mr. Chief Justice Fuller, in delivering the opinion of the court said:

"It is enough that in Tennessee the doctrine of *res judicata* is not applicable to taxes for years other than those under consideration in the particular case in as much as what effect a judgment of a State court shall have as *res judicata* is a question of State *of* local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication. Phœnix Fire & Marine Ins. Co. *v.* Tennessee, 161 U. S. 174. In New Orleans *v.* Citizens Bank 167 U. S. 371 referred to by appellant's counsel no claim was made that the judgment relied on would not have been *res judicata* in the State courts and attention was particularly called to the fact that the rule in Louisiana was in accord with the conception of *res judicata* expounded in that case. As the judgment

pleaded had no force or effect in the Tennessee State courts other than as a bar to the identical taxes litigated in the suit, the courts of the United States can afford it no greater efficacy. Cooper *v.* Newell, 173 U. S. 555; Metcalf *v.* Watertown, 153 U. S. 671; Chicago & Alton R. R. Co. *v.* Wiggins Ferry Co. 108 U. S. 118; Rev. Stat. sec. 905."

This case is binding upon me and settles the matter in accordance with defendants' contention. It is true that, in the cases
171 hereinbefore cited, the Supreme Court held as to certain of the banks involved along with the complainant in the litigation which resulted in the decision in 97 Ky. — that they were exempted from other taxation than under the Hewitt law bylan irrevocable contract, that said decision made the question *res judicata* as to subsequent years, but at the time it is so held there had been no decision by the court of appeals of Kentucky as to the effect of an adjudication in relation to one year's taxes upon other year's taxes. Since then, as we have seen, that court has taken position that such adjudication is not a bar to a consideration of the question of the liability for the other year's taxes on its merits. That being so, I feel bound by the decision of the supreme court in the Tennessee case to hold that the former adjudication relied on herein is not a bar to a consideration of complainant's liability for the taxes involved herein on the merits. And so considering it, I am bound by the decision of the Kentucky court of appeals in the Second Bank Tax cases and of the Supreme Court in the Owensboro case to hold also that complainant has no irrevocable contract under the Hewitt law, and that, therefore, the complainant is liable under the act of March 21", 1900, to the taxes which have accrued or will accrue since its passage. A decree will, therefore, be entered dismissing complainant's bill as to said taxes and permitting the decree entered pursuant to the opinion of Judge Evans in relation to former years' taxes to stand as entered.

A. M. J. COCHRAN, *Judge.*

172 And, on a day following, to-wit, on June 16th, A. D. 1903 decree was entered herein which was and is in words and figures following, to-wit:—

Order Book "J," page 88.

Decree.

This cause having been submitted and the court being sufficiently advised files its opinion herein.

It is therefore ordered, adjudged and decreed as follows:—

1. That the complainant's bill of complaint herein is dismissed in so far as it seeks to enjoin the assessment and collection of taxes for any time subsequent to March 21st, 1900.

2. The decree entered pursuant to the opinion of Judge Evans on the 17th day of December, 1900, is permitted to stand as entered.

3. That the defendants recover of complainant so much of defendants' costs herein as accrued subsequent to December 17th, 1900.

To so much of this decree as permits the said decree entered pursuant to the opinion of Judge Evans, on December 17th, 1900, to stand as entered, the defendants except.

To so much of this decree as is adverse to complainants complain-t by counsel comes and excepts.

And, on a day following, to-wit, on June 20th, A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:

Order Book "J," page 92.

This cause coming on to be heard upon the defendants' petition for appeal, praying an appeal from the decree and order entered herein on the 16th. day of June, 1903, to the Supreme Court
173 of the United States, and the assignment of errors filed herein. The court being fully advised it is ordered that the appeal prayed for by the defendants herein, be and the same is now granted and the claim of appeal therein made is allowed. And, it is further ordered that the appeal bond be filed at the sum of one thousand dollars ($1000.00).

Whereupon came the defendants herein and offered bond in the sum of ($1000.00) one thousand dollars, with the American Bonding Company of Baltimore as surety, which bond is hereby approved.

And, on the same day to-wit, on June 20th. A. D. 1903 petition for appeal was filed herein which was and is in words and figures following, to-wit:—

Petition for Appeal.

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON ET AL., Defendants.

The defendants, City of Covington *et al.*, conceiving themselves aggrieved by the decree and order made and entered herein on the 16th day of June, 1903, in the above entitled cause, do hereby appeal from said decree and order to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herewith, and pary that this appeal be allowed and that a transcript of the record, proceedings and papers upon which said decree

and order was made and entered, duly authenticated, may
174 be sent to the Supreme Court of the United States.

W. H. JULIAN,
F. J. HANLON,
Att'ys for Defendants.

And, on the same day, to-wit, on June 20th., A. D. 1903, assignment of errors was filed herein which was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, Complainant,
vs.
THE CITY OF COVINGTON ET AL., Defendants.

Assignment of Errors.

For assignment of errors in the decree and order made and entered in the above entitled cause on the 19th., day of May 1903, the defendants City of Covington *et al.*, say; said decree and order is erroneous and against the rights of the defendants because: 1st., the court erred in permitting the decree entered herein on the 17th day of December, 1900 pursuant to opinion by Judge Evans to stand as entered. The said decree entered pursuant to opinion by Judge Evans was erroneous in holding the act of March 21st., 1900 to be invalid in so far as the same was retro-active and in
175 enjoining the assessment and collection of taxes for any time prior to that date, and should have been set aside on the motion of the defendants made for that purpose.

2nd. The court erred in over-ruling the motion of the defendants to set aside said decree entered on Dec. 17th., 1900, pursuant to opinion by Judge Evans.

3rd. The court erred in enjoining the defendants from proceeding to assess the shares of stock in complainant for the purpose of taxation for any time previous to March 21st., 1900 and from collecting any tax for any time previous to March 21st., 1900.

4th. The court erred in overruling the defendants' motion to file an answer to the bill of complaint as amended herein.

5th. The court erred in holding the act of March 21st., 1900 to be invalid in so far as the same was retro-active.

6th. The court erred in overruling the defendants' demurrer to the bill of complaint as amended; and in granting any injunction herein, and in adjudging any costs against the defendants.

7th. The court erred in over-ruling defendants' plea to the jurisdiction of the court herein.

W. H. JULIAN,
F. J. HANLON,
Att'ys for Defendants.

And, on the same day to-wit, on June 20th., A. D. 1903, appeal bond was filed herein which was and is in words and figures following, to-wit:

176 United States Circuit Court.

FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
vs.
THE CITY OF COVINGTON ET AL., Defendants.

Appeal Bond.

Know all men by these presents, that we The City of Covington, Ky., and John Middendorf, assessor of said city, as principals and The American Bonding Company of Baltimore as surety, are held and firmly bound unto the complainant, The First National Bank of Covington, Ky., in the just and full sum of one thousand ($1000.00) dollars, to be paid to the said complainant, their attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Signed and sealed this 18th day of May, 1903.

Whereas lately in the circuit court of the United States for the eastern district of Kentucky at Covington in a suit pending therein between The First National Bank of Covington, Ky., complainant and The City of Covington, Ky., *et al.*, defendants, a decree was rendered against the defendants; and the said defendants having obtained an appeal to reverse the said decree against them and a citation directed to the aforesaid complainant admonishing it to be and appear in the Supreme Court of the United States in the city of Washington, D. C., at the October, 1903, term thereof.

177 Now, the condition of the above obligation is such that if the said City of Covington, Ky., and John Middendorf shall prosecute said appeal to effect and answer all costs if they fail to make the said plea good, then the above obligation should be void, otherwise to remain in full force and virtue.

Witness our hands the date above written.

THE CITY OF COVINGTON,
By W. A. JOHNSON, *Mayor*,
Principals.

Approved—
A. M. J. COCHRAN,
U. S. District Judge.

AMERICAN BONDING COMPANY
OF BALTIMORE,
By BEN A. ADAMS, *Vice Pres.*

Attest: L. J. DROEGE, *Ass't Sec'y.*

178 And, on a day following, to-wit, on July 14th, A. D. 1903 citation was issued herein which was and is in words and figures following, to-wit:—

Citation.

Supreme Court of the United States.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

To the City of Covington, Kentucky, and John N. Middendorf, the assessor of the city of Covington, Greeting:

You are hereby cited to be and appear at a session of the Supreme Court to be holden at the city of Washington, D. C. on the 14th day of August next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Kentucky, wherein, First National Bank of Covington, Kentucky, is appellant and you are appellee-, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of July in the year of our Lord one thousand nine hundred and three and of the Independence of the United States of America the one hundred and twenty eighth year.

A. M. J. COCHRAN,
United States District Judge, Eastern District of Kentucky.

179 And, on a day following, to-wit, on July 15th, A. D. 1903 said citation was returned endorsed in words and figures following, to-wit:—

I hereby accept service of within citation for the City of Covington, and John N. Middendorf, city assessor, appellees this 15th, day of July, A. D. 1903.

F. J. HANLON,
City Solicitor.

180 And on a day following: to-wit:—on June 30th, A. D. 1903—an entry was made herein, clothed in words and figures as follows to-wit:—

Journal J, page 100.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, }
vs.
THE CITY OF COVINGTON, KENTUCKY. }

This day came the complainant herein and by leave of court first had and obtained, now files its petition for appeal herein and as-

signment of errors, and prays an appeal from the decree and order of this court to the Supreme Court of the United States.

The court being fully advised it is now ordered that the appeal prayed for by the complainant herein be and the same is hereby granted. And it is further ordered that the injunction heretofore granted, be continued in force pending said appeal, until the final judgment and decree of the said Supreme Court of the United States.

It is further ordered by the court that the complainant herein give a bond in the sum of $20,000.00 with good and sufficient surety as an appeal bond and an indemnity bond.

Whereupon came the complainant and offered bond in the said sum of $200,000.00 which bond was approved by the court and ordered filed.

181 And, on the same day, to-wit, on June 30th., A. D. 1903 petition for appeal was filed herein which was and is in words and figures following, to-wit:

United States Circuit Court for the Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON & JOHN MIDDENDORF, Assessor, Defendants.

The above named complainant, The First National Bank of Covington, Ky., conceiving itself aggrieved by the final decree, order and judgment entered in the above entitled cause, June 16th, 1903, hereby appeals separately from so much of said final decree, or order, as dismisses its bill, and refuses to grant a perpetual injunction sought in said bill against the defendants, The City of Covington and John Middendorf, its assessor, from and after March 21st., 1900.

And the First National Bank of Covington, Ky., prays that this, its appeal to the Supreme Court of the United States may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree, order and judgment was made, duly authenticated may be sent to the said Supreme Court of the United States.

And now at the time of filing this petition for appeal The First National Bank of Covington, Ky., appellant, files an assign-
182 ment of errors, setting up separately and particularly each error asserted and intended to be urged in the Supreme Court of the United States.

And your petitioner will ever pray.

S. D. ROUSE,
Att'y for Complainant.

And, on the same day, to-wit, on June 30th., A. D. 1903, assignment of errors was filed herein which was and is in words and figures following, to wit:—

United States Circuit Court, Eastern District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY., Complainant,
v.
THE CITY OF COVINGTON and JOHN N. MIDDENDORF, Assessor of the City of Covington, Defendants.

Assignment of Errors.

The complainant prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:—

First. That the court erred in dismissing the bill of com-
183 plaint herein in so far as it sought to enjoin the assessment and collection of taxes by the defendant subsequent to March 21st., 1900.

Second. That the court erred in refusing to make the temporary injunction herein before granted perpetual for the full period of the charter existence of complainant herein.

Third. That the court erred in failing to adjudge that the complainant, The First National Bank of Covington, Ky., had an irrevocable contract with the Commonwealth of Kentucky upon the continued compliance by it with the provisions of the act of the General Assembly of the Commonwealth of Kentucky of May 17th., 1886, whereby no taxes for municipal purposes can be exacted from it, or imposed upon the shares of stock of complainant, or upon any of its property of any kind, except its real estate and banking building during the corporate existence of said complainant, to-wit, until and including the 17th of November, 1904.

Fourth. That the court erred in failing and refusing to declare the act of the General Assembly of the Commonwealth of Kentucky, approved March 21st., 1900, in so far as it attempts to impair the validity of said contract, to be null and void.

Fifth. That the court erred in failing and refusing in said decree to adjudge that the contract between the Commonwealth of Kentucky and this complainant was, and is *res adjudicata*, and that the defendant, The City of Covington, is estopped to claim or assert that complainant has not such irrevocable contract.

The complainant prays that this court by proper orders upon such terms as it may prescribe as to bond, will continue the temporary injunction herein in force pending the appeal.

Wherefore complainant herein prays that the decree of the circuit court herein upon the errors assigned may be reversed.

S. D. ROUSE,
Complainant's Att'y.

184 And, on the same day, to-wit, on June 30th., A. D. 1903 a bond was filed herein which was and is in words and figures following, to-wit:—

Bond.

Know all men by these presents, that we, The First National Bank as principal, and Bradford Shinkle as surety are held and firmly bound unto the City of Covington, Ky., and John N. Middendorf, the assessor of the city of Covington, Kentucky, in the full and just sum of twenty thousand dollars, to be paid to either of them, as their interests may appear, to which payment well and truly to be made, we bind ourselves jointly and severally, and our and each of our successors, assigns, executors and administrators.

Given under our hands and sealed with our seals and dated this 30th. day of June, 1903.

Whereas the above named complainant, The First National Bank of Covington, Ky., hath prosecuted its appeal to the Supreme Court of the United States, to reverse in part the final judgment and decree rendered in the above entitled suit, by the circuit court of the United States for the district of Kentucky; now, therefore, the condition of this obligation is that, if the above named, The First National Bank of Covington, Kentucky, shall prosecute its said appeal to effect and answer all costs and damages that may be adjudged, or awarded against it, if it shall fail to make good its plea, then

185 this obligation to be void; otherwise in full force.

In presence of

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
By FRANK P. HELM, *President.*
BRADFORD SHINKLE.

Approved this June 30th., 1903,
A. M. J. COCHRAN, *Judge.*

186 And, on a day following, to-wit, on July 14th., A. D. 1903 citation was issued herein which was and is in words and figures following, to-wit:—

Citation.

Supreme Court of the United States.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

To First National Bank of Covington, Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., on the 14th day of August next, pursuant to

an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Kentucky, wherein, The City of Covington, Kentucky, and John N. Middendorf, the assessor of the city of Covington are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 14th day of July, in the year of our Lord one thousand nine hundred and three and of the Independence of the United States of America the one hundred and twenty eighth.

A. M. J. COCHRAN,
United States District Judge, Eastern District of Kentucky.

187 And on a day following, to-wit, on July 15th., A. D. 1903, said citation was returned endorsed in words and figures following, to-wit:—

I hereby, this July 15th., 1903 accept due personal service of this citation on behalf of The First National Bank of Covington, Kentucky, appellee.

S. D. ROUSE,
Solicitor for Appellee.

188 UNITED STATES OF AMERICA, *Eastern District of Kentucky,* } ss:

I, Jos. C. Finnell, clerk of the United States circuit court, for the sixth judicial circuit and eastern district of Kentucky, at Covington, do hereby certify that the foregoing 187 pages contain a full, true and complete transcript of the file and proceedings had herein in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness, my hand as clerk, and the seal of said court, at Covington, this — day of July A. D. 1903, and of our Independence the 128 year.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

JOS. C. FINNELL, *Clerk,*
By J. W. MENZIES, *D. C.*

Endorsed on cover: File No. 19,065. E. Kentucky C. C. U. S. Term No. 414. The City of Covington and John Middendorf, assessor of said city, appellants, *vs.* The First National Bank of Covington, Kentucky. File No. 19,066. Term No. 415. The First National Bank of Covington, Kentucky, appellant, *vs.* The City of Covington and John Middendorf, assessor of said city. Filed September 12th, 1903. File Nos. 19,065 and 19,066.